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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 246.

PETER O. STRANG, JOHN B. HOLLAND, AND JOSEPH HOLLAND, PLAINTIFF IN ERROR,

vs.

AMARIAH H. BRADNER, AND DANIEL LOWREY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED AUGUST 1, 1882.

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a STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 30th day of May, in the year of our Lord one thousand eight hundred and eighty-two, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge, presiding.

E. O. PERRIN, *Clerk.*

Remittitur. June First, 1882.

AMARIAH H. BRADNER and DANIEL LOWREY, Respondents,
ag'st
PETER O. STRANG and others, Appellants.

Be it remembered that on the second day of March, in the year of our Lord one thousand eight hundred and eighty-one, Peter O. Strang, John B. Holland, and Joseph Holland, the appellants in this action, came here into the court of appeals, by George H. Forster, their attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and Amariah H. Bradner and another, the respondents in said action, afterwards appeared in said court of appeals by Wood & Scott, their attorneys.

b Which said notice of appeal and the return thereto, filed as aforesaid, are hereto annexed:

Whereupon the said court of appeals, having heard this cause argued by Mr. George H. Forster, of counsel for the appellants, and Mr. William F. Cogswell, of counsel for respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed. And it was further ordered and adjudged that the respondents recover against the appellants costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded against according to law.

Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and standing full force, strength, and effect.

And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are, by the said court of appeals, remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be entered according to law, and which record now remains in the said supreme court before the justices thereof, etc.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

1 Court of Appeals.

CLERK'S OEFICE, ALBANY, *June* 14, 1882.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

E. O. PERRIN, *Clerk.*

Case and Exceptions.

Supreme Court.

AMARIAH H. BRADNER and DANIEL LOWREY
against
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND.

The summons and complaint in this action were served June 3, 1878. The answer was served June 21, 1878. The reply was served July 27th, 1878. The issues came on for trial at the Livingston circuit, before Hon. Charles C. Dwight and a jury, on the 6th day of February, 1880, when the following proceedings were had:

The counsel for the plaintiffs, to maintain the issues on their part, called Amariah H. Bradner, who was sworn and testified: I live at Dansville; my co-plaintiff, Mr. Lowrey, lives at Rochester; our copartnership business was buying wool and sheepskins at Rochester; our correspondents in New York were Strang & Holland; we had been engaged in business with them for about three years; we usually shipped our wool to them for sale, and drew upon them for the proceeds of the wool; we drew against the wool usually when shipped; we had been in the habit of sending them notes from time to time when they wrote for them, without reference to the particular condition of our account; they also drew sight drafts on us and we drew time drafts on them; they failed June 4, 1875; I was one
2 of the creditors; I got 5½ per cent. The letters of that firm were written mainly by Mr. Strang, signed sometimes individually, sometimes as a firm; I know his handwriting; letter shown is his handwriting; it is addressed to my partner; I first saw it a short time after it was received.

Read in evidence. Marked "Exhibit No. 1." (Inserted in Appendix.)

This letter is also written by Strang. Read in evidence. Marked "Exhibit No. 2." (Inserted in Appendix.)

This letter is also written by Strang. Read in evidence. Marked "Exhibit No. 3." (Inserted in Appendix.)

Q. Do you know whether your firm, in accordance with that request, sent those notes; and, if so, which ones?

A. The first four mentioned.

The counsel for the plaintiffs then read the same in evidence.

"$4,850. ROCHESTER, N. Y., *March 13th*, 1875.

Four months after date we promise to pay to the order of ourselves forty-eight hundred and fifty dollars, payable at the Metropolitan National Bank, New York, value received.

LOWREY & BRADNER."

Endorsed on the back: "Lowrey & Bradner."

"$4,951.25. ROCHESTER, N. Y., *March 14th*, 1875.

Four months after date we promise to the order of ourselves forty-nine hundred and fifty-one $\frac{25}{100}$ dollays, payable at the Metropolitan National Bank, New York, value received.

LOWREY & BRADNER."

Endorsed on the back: "Lowrey & Bradner."

"$4,860.30. ROCHESTER, N. Y., *March* 16, 1875.

Four months after date we promise to pay to the order of
3 ourselves forty-eight hundred and sixty $\frac{30}{100}$ dollars, payable at Metropolitan National Bank, New York, value received.

LOWREY & BRADNER."

Endorsed on the back: "Lowrey & Bradner."

"$4,970. ROCHESTER, N. Y., *March* 20, 1875.

Four months after date we promise to pay to the order of ourselves forty-nine hundred and seventy dollars, payable at Metropolitan National Bank, New York, value received.

LOWREY & BRADNER."

Endorsed on the back: "Lowrey & Bradner."

The testimony of George W. McMillan, Jr., taken under commission, is read in evidence.

GEORGE W. MCMILLAN, Jr., being duly sworn, says:

Q. Where do you reside?

A. Orange, New Jersey.

Q. Where is your place of business?

A. Discount clerk of the Importers' and Traders' National Bank of New York, New York city, and have been for about twelve years.

Q. Do you know the defendants or any of them, Peter O. Strang, John B. Holland, Joseph Holland, composing the firm Strang & Holland Brothers?

A. I know of that firm.

Q. Where was their place of business when they were in business?

A. In the city of New York.

Q. Did the Importers' & Traders' National Bank discount any note for them made by Lowrey & Bradner

A. No.

Q. Did Importers' and Traders' National Bank have any notes made by Lowrey & Bradner, and when did they obtain them?

A. The bank purchased two notes made by Lowrey &
4 Bradner, endorsed by Strang and Holland Brothers, on March 9th, 1875, from O. M. Bogart & Co., bankers and brokers, less the discount at 6 per cent.

Q. Have you those notes now in your possession?

A. Yes, sir.

Q. Will you produce them?

The witness produces two notes, of which the following are copies:

"$4,325.50. ROCHESTER, N. Y., *Feb.* 1, 1875.

Four months after date we promise to pay to the order of ourselves forty-three hundred and twenty-five $\frac{50}{100}$ dollars, payable at office of Strang & Holland Brothers, 142 Duane street, N. Y., value received.

LOWREY & BRADNER."

(Endorsed:) "Lowrey & Bradner." "Strang & Holland Brothers."

"$4,326.25. ROCHESTER, N. Y., *Feb.* 9, 1875.

Four months after date we promise to pay to the order of ourselves forty-three hundred and twenty-six $\frac{50}{100}$ dollars, payable at office of Strang & Holland Bros., 142 Duane street, N. Y., value received.

LOWREY & BRADNER."

(Endorsed:) "Lowrey & Bradner." "Strang & Holland Bros."

Q. Who had the proceeds of the notes?

A. The bank paid the amount of the notes less the discount, six per cent., to O. M. Bogart & Co.

Q. Has the bank had possession of those notes ever since?

A. Yes, sir.

Cross-examination by Mr. FORSTER, counsel for defendant:

Q. What amount has been paid on these notes by anybody?

5 A. On an indebtedness amounting to $18,529.87, of which these notes formed a part, we have received a dividend from Strang & Holland Brothers amounting to $936.92, and from Lowrey & Bradner on these two notes $3,017.13.

Q. Are Lowrey & Bradner released from further payment of those notes?

A. We agreed to accept that sum as their share of that claim; they are discharged from the further payment of those notes.

Q. When was that payment made by Lowrey & Bradner?

A. On September 10, '75, $734.68; December 19, '75, $747.94; March 19, '76, $760.84; June 19, 76, $773.67.

Q. When was the dividend by Strang & Holland paid?

A. February 9th, 1878.

Q. When was the arrangement as to this settlement with Lowrey & Bradner made?

A. September 16, 1875.

Re-examined by Mr. WOOD, counsel for plaintiff:

Q. Are you acquainted with the handwriting of Strang & Holland Bros.; look at the endorsements on these two notes and see if it is in the handwriting of that firm?

A. I am acquainted with their handwriting, and it is their signature.

5* The counsel for the plaintiff then read the notes in evidence as follows:

$4,325.50. ROCHESTER, N. Y., *February* 1, 1875.

Four months after date we promise to pay to the order of ourselves forty-three hundred and twenty-five $\frac{50}{100}$ dollars, payable at the office of Strang and Holland Brothers, 142 Duane street, N. Y. Value received.

LOWREY & BRADNER.

Endorsed: "Lowery & Brander." "Strang & Holland Brothers."

$4,326.25. ROCHESTER, N. Y., *February* 9, 1875.

Four months after date we promise to pay to the order of ourselves forty-three hundred and twenty-six $\frac{25}{100}$ dollars, payable at the office of Strang & Holland Brothers, 142 Duane street, N. Y. Value received.

LOWREY & BRADNER,

Endorsed: "Lowrey & Bradner." "Strang & Holland Bros."

$4,327.13. ROCHESTER N. Y., *February* 15, 1875.

Four months after date we promise to pay to the order of ourselves forty-three hundred and twenty-seven $\frac{13}{100}$ dollars, payable at the office of Strang & Holland Bros., 142 Duane street, N. Y. Value received.

LOWREY & BRADNER.

Endorsed: "Lowrey & Bradner." "Strang & Holland Bros."

5** $4,327.15. ROCHESTER, N. Y., *February* 20, 1875.

Four months after date we promise to pay to the order of ourselves forty-three hundred and twenty-seven $\frac{15}{100}$ dollars, payable at office of Strang & Holland Bros., 142 Duane street, N. Y. Value received.

LOWREY & BRADNER.

Endorsed: "Lowrey & Bradner." "Strang & Holland Bros."

It was proved on the trial that the notes, of which the above are copies, were received by the defendants, and endorsed and negotiated

by them prior to the 27th day of March, 1875, and are the same notes mentioned and described in the testimony of McMillan, taken *de bene esse* and the testimony of Gay, Thompson and Davis, taken by virtue of the commissions above referred to.

Testimony of W. B. S. Gay and John Townsend, taken under commission, is read. (Inserted in Appendix.)

Amariah H. Bradner's testimony continued:

The notes attached to these depositions are the notes we sent in pursuance of the letter of March 1st, read in evidence.

6 Q. State whether in sending this second batch of notes you relied upon the statements which the defendants made in the letter of March 27th, and April 2d, in regard to the first lot.

Objected to by defendants; admitted; defendants duly excepted.

A. Yes, sir.

Cross-examined:

Our firm of Lowrey & Bradner was formed in November, 1872, and has not been dissolved, but has continued without intermission. Mr. Lowrey wrote most of the correspondence of the firm. I became acquainted with Mr. Strang in 1849 or 1850. Individually I was a creditor of the firm about $8,300. It arose a year or two previous to their failure. I remember that Lowrey had an unsettled account with Strang & Holland.

Q. Had not Strang often told you that Lowrey owed their firm $23,000, or $24,000?

Objected to; excluded; defendants duly excepted.

Q. Are you not familiar with the account of your firm with Strang & Holland?

A. Yes; I produce the account. Read in evidence. Marked "Ex. A." (Inserted in Appendix).

Q. Do you see in that account the four notes you are credited with under the date of 5th, 8th, 10th, and 13th of March?

A. Yes.

Letter and account of March 31st, proved and read in evidence, marked "Ex. B & C." (Inserted in Appendix).

The four notes credited in that account under the date, March 8, are the four notes which have been referred to in the depositions read. The letter which accompanied this account was written March 31st, and stated that we owed them $34,372.86, and left us our notes to pay. We did not regard that as information to us that our notes had been used and we held liable for the same. I don't think it was proper that the notes should have been credited if the defendants could not use them. The account is not evidence to us that they had used them. This account, received on the 1st of April, crediting the notes to us on the 8th of March, I don't understand to be an admission that the defendants had used

the notes, followed, as it was, by their letter of April 2d. I saw the account and the letter at the same time.

Q. If these notes were not credited to you, the balance against you would be $51,000, instead of $34,000?

A. As you made it; I received a subsequent account from defendants after their failure, dated June 30th.

Read in evidence. Marked "Exhibit D" (inserted in Appendix).

The four notes credited on this account on May 11th are the four we sent after receipt of the letter of April 2d. There was a note due March 5th, another due March 8th, another the 10th, and another the 13th for $4,000; 24th of March, $4,250; the 29th, $4,251.32; 2d of April, $4,351.33; 8th of April, another of $4,200; so that in March and the early part of April, down to the 8th, there were eight notes running to maturity, each for $4,000 or over.

The defendants' letter of the 1st of March asks for six notes.

Q. You understood them to be to provide for the notes maturing in March?

A. Not at all; we were in the habit of remitting money to pay our notes.

Q. You had six notes coming due from the 5th to the 29th of March, and on the 1st of March they wrote you requesting you to send them six notes?

8 A. Yes, sir.

Q. Do you say you didn't understand that they were to provide for the six notes maturing that month?

A. Yes, sir.

Q. You sent them but four notes?

A. Yes, sir.

Q. That left two notes maturing not provided for?

A. It left two notes for us to remit for.

Q. Do you mean to say that you did not understand this to be a request that you should provide for the two notes maturing in the latter part of March and the two maturing on the 2d and 8th of April?

A. Not at all; we were not obliged to send notes.

Q. You were not sending a great deal of money at the time?

A. The accounts will show.

Q. They drew and you drew?

A. Yes, sir.

Q. During the months of February and March, did you send any money except by paying their drafts?

A. I presume we did; I paid them $30,000 myself, money that I had on deposit with the defendants. I could have taken it out and handed it to them. I had that amount to my credit, and had them transfer it to the credit of my firm, and it went towards the payment of those notes.

The firm account was reduced from $63,000 to $34,000.

Q. How was it, when, on the 1st of March, 1875, they requested you to send six notes, you sent only four?

A. I couldn't tell you.

Q. Do you mean to say that when, on the 2d of April, they requested you to send four notes, you did not understand they meant them to pay the two notes coming due the last of March and the two coming due the 1st of April?

A. I do.

Q. You mean to say that?

A. Yes, sir; I can't say how long these eight notes had
9 been running through the accounts; I didn't know anything about the number of the notes running from the commencement of the transactions between the two firms, whether two or eight; the firm of Strang & Holland Brothers was formed about April, 1873; before that there had been the firm of Strang & Holland, of which Strang had been the senior partner.

Q. Look at the account of November 12, 1873, by Strang and Holland Bros. to you, at the first item, you are debited with a transfer of an account from the previous firm?

A. It appears so.

Q. Look on the other side of that account, and see if that account does not show that as early as that date you had eight notes running for a little more or less than $4,000?

A. I see eight there. Account marked "Exhibit E" (inserted in Appendix):

Q. Those notes are for a little less than $4,000, most of them?

A. Yes, sir.

Q. Does not that show you that these substantially represent the same amount in notes, the difference being that by the aggregation of interest and discount the amount of notes had increased to what it was in March and April, 1875?

A. It might have been so. We were constantly sending money and drafts which might vary the account.

Q. Do you say you ever formed the opinion that Strang had undertaken to deceive your firm or practice fraud upon you?

A. Yes, sir.

Q. When do you say you formed an opinion that he was so bad a man as that?

A. About the 6th day of June, the first time I saw him after his failure.

Q. Were there not the same expressions of confidence and friendship after that date as before?

A. I could not tell you about that.

10 Q. Were not the letters that were addressed to him as friendly after his failure as they ever had been before?

A. I could not tell you.

Q. Were not the business letters of your firm in 1876 and 1877, and until the commencement of this suit, addressed to him as "Friend Peter," the same as before?

A. I did not write any such letters.

Q. Don't you know there was never any intimation of distrust with him until he was arrested by the sheriff in this suit?

A. No, sir.

Q. Is it not the fact that the way in which the correspondence between these two firms for years was carried on is "Dear Daniel" on one side and "Dear Peter" on the other?

A. Part of them were done so.

Q. Were not nine-tenths so?

A. I don't know; you have three letters, and two of them are done so; probably about half were written that way on both sides; I seldom saw the correspondence; so far as I did see it, I should think it was carried on in precisely the same way up to the time of the commencement of this suit; the three notes of March 13th, 1875, March 16th, and March 20th we got from the Broadway Bank by the payment of about 60 per cent.; the other note from R. Adams Britton was paid in full after suit.

Redirect:

Q. In relation to these accounts state whether the defendants, in making up their account against you, charged you with their acceptances of your drafts.

A. Yes, sir.

Q. As so much cash?

A. Yes, sir; we were in the habit of drawing upon them on time; when they accepted the draft they charged it to us in account as paid; it was in reference to that that I made the suggestions referred to in the letter of March 27th.

11 Q. I show you the account of June 30, that purports to show you firm a debtor of how much?

A. $13,301.

Q. How many of your drafts on that firm, accepted by them, are there charged in that account?

A. $32,723.30.

Q. And it is by charging you that that they made that balance?

A. Yes, sir; their drafts were outstanding and unpaid at the time of their failure; our firm took them up.

Q. State whether the deduction of that amount from the $32,723.30 shows the true condition of the account between your firm and the defendants.

A. Yes, sir.

Q. Look at the account of March; what is the amount of the indebtedness shown against your firm there?

A. $34,372.86.

Q. State what amount is charged as acceptances in that account that had not matured.

A. $20,196.56.

Q. That is to be deducted from the $34,372.86 to show the true state of the accounts then?

A. Yes, sir.

Q. Take the account of December; what is the amount of the indebtedness shown against your firm in that?

A. $39,993.

Q. What is the amount of the time acceptances they have charged against you there?

A. $87,000; the drafts that we drew and they accepted were, ordinarily, upon 30 and 60 days' time; when the drafts were made we deposited them with our bank, and after that we had nothing to do with them; the proceeds were remitted to the defendants; we sent them the money, and they still charged us with the drafts.

Q. State whether, at the time your firm sent these notes in March and April, there were a large number of acceptances outstanding of this character.

A. Yes, sir; there were a large amount of acceptances out

12 Q. Look at the account and state what amount of drafts which you had drawn in the way you have described were outstanding and unpaid by the defendants at the time you sent those notes in April.

A. $20,196.56.

Recross-examination:

The accounts are made up with an interest account, where the note or acceptance was due before the rendition of the account, the interest is made up in red ink, and when after in blue ink; you can tell very clearly from the accounts when Strang & Holland got the cash from the drafts, and when they did not; for the three notes taken from the Broadway Bank we paid 60 per cent., with interest from the time of the maturity of the notes.

DANIEL LOWREY, sworn and examined for plaintiffs:

I have heard read the letters of March 27th and April 2d and the letter of March 1st; I remember the sending of the notes; I first learned that the notes sent in the letter of March 1st had been used by Strang & Holland after their failure, June 6th, in New York, at their office; I was there with Bradner; we saw Strang, and Bradner immediately asked him if he had used the notes, and he said he had; that was the first knowledge we had of the defendants using the notes; I sent the notes.

Q. State whether, in sending that second batch of notes, you relied upon the statement contained in the letters of March 27 and April 2nd.

This question was objected to by defendants' counsel. Objection overruled, and exception by defendants.

A. We did; Bradner knew of my sending them; he was posted on the whole correspondence, and concurred in sending them, but I wrote the letter which transmitted them.

13 Cross-examined:

I have known Peter O. Strang 25 years; I was his partner from 1857 to 1861; my relations with him were always intimate and confidential; after the 6th of June I did not express myself to him in writing any differently from what I did before; I always addressed him after that as I did before; I remember very well how I addressed him.

Q. After he got his discharge in bankruptcy you proposed to him to go into business with you?

A. I don't know whether I did or not. I wrote him very frequently.

Q. Did your firm stop payment?

Excluded; defendants duly excepted.

A. Before the failure of Strang & Holland I conducted the correspondence on the part of my firm. The greater part of the correspondence was conducted between me and Strang individually. It was conducted the same way after the failure.

Letter shown is written by Bradner, and read in evidence. Marked "Exhibit F" (inserted in Appendix).

Letter shown is my handwriting; read in evidence. Marked "Exhibit G." (inserted in Appendix).

This is the telegram referred to in the letter. Read in evidence (inserted in Appendix).

The letters produced are in my handwriting. Read in evidence, marked "Exhibits H, I, K, L, N, O, P, Q, R, S, T" (inserted in Appendix).

This letter is written by Bradner. Read in evidence. Marked "Exhibit M" (inserted in Appendix).

14 Q. I have read the letters of December. Is that a fair example of the manner in which this business was done, so far as it is expressed in your letters to this firm in New York, during the time covered by your accounts?

A. I think so.

Three letters are proved, the first written by Lowrey, the other two by Bradner, and read in evidence. Marked "Exhibits U, V, and W" (inserted in Appendix).

Q. The notes that you sent in response to the letter of March 1st, why did you send four notes instead of six?

A. I thought four were enough.

Q. When they asked for them you understood that they intended to use them?

A. Yes, sir.

Q. Notes you sent were always sent to be used?

A. Yes, sir.

Q. The course of their use of them was to have them discounted?

A. I don't know; they discounted or sold them. All the knowledge we had of their using them was when they rendered an account, crediting us with them. We sent the notes; they had them discounted, and credited them to us; they never advised us in any other way that they had used them.

Q. When they had used the notes, the only way in which you got the information that they had used them was by the credit of the note in the account, with interest from the time the note was due?

A. We supposed they had used them if they credited them; we received the account of the 31st of March, 1875, on the first of April; the pencil entries below it of April 1st and 3d are the handwriting of our book-keeper, and are the same items as are in the account of June 30th, under date April 2d and 5th; I examined the account when I got the letter of April 2d.

15 Q. When he wrote "your notes which have recently run off," you understood him to mean notes that had recently matured?

A. Yes.

Q. That is to say, the two notes that were due the 24th and 29th of March, which had not been provided for?

A. I presume so.

Q. And the note due April 2d, the same day this letter was written?

A. Yes, sir.

Adjourned to February 7th.

FEBRUARY 7TH.

Mr. Forster proved that Mr. John R. Strang, associate counsel for defendants, had been taken sick since the adjournment of the court, and asked a postponement until he was able to attend.

The court declined; defendants duly excepted.

The defendants proved and read in evidence the letter of April 8th, written by Lowrey (inserted in Appendix).

Redirect examination:

When I received the account of March 31st, 1875, I had the letter of March 27th in my possession. There were no other $16,000 of notes which we had sent to the defendants except those we had sent in answer to the letter of March 1st.

A. H. BRADNER, recalled by plaintiffs:

I learned that Strang obtained his discharge in bankruptcy. I saw him a few months after defendants' failure. He told me that when he got a discharge in bankruptcy, if he got one, he would have the ability and disposition to make an honorable settlement with me.

16 Cross-examined:

I first learned that the four notes had been sent to the defendants—the four that were sent in April—at the time they were sent.

The defendants' counsel here proved and read in evidence the letter, mareed "Exhibit Y," (inserted in appendix.)

Q. Can you state why it was that the notes were made for the amounts stated in that letter after Strang had asked that they be made for about $4,000?

A. I remember what Lowrey said about it. I know Henry Bucking. He had business with Strang & Holland. We purchased sheepskins, and they were paid for in notes.

Q. And the notes were carried along through this account?

A. Not to my knowledge.

Two letters written by Bradner are proved and read in evidence. Letters of July 11th and November 4th, 1876, (inserted in appendix.)

Plaintiffs rested.

Defendants moved for a non-suit. Motion denied. Defendants duly excepted.

JOHN B. HOLLAND sworn and examined for defendants.

I reside in New York; am 32 years old; a clerk with the American Express Company, corner of 22d street and Broadway.

Q. What is your salary?

Excluded. Defendants duly excepted.

17 Q. What was your business in 1875?

A. Prior to our failure I was in the firm of Strang & Holland Brothers, in the wool business. I entered that business in 1871 or 1872, in partnership with Strang, under the firm name of Strang & Holland. April 1st, 1873, Strang & Holland Brothers was formed by my brother coming into the firm. The business was selling wool on commission and making advances.

Q. Name the people to whom you made advances?

Excluded; defendants duly excepted.

Q. Did you on the first of June, 1875, five days before your failure, have due you for advances made by you to the various parties with whom you were doing business as commission merchant, sums amounting to the aggregate sum of $250,000?

Excluded as immaterial; defendants duly excepted.

Q. When did you first know Lowrey?

A. Right away after I went into business with Strang I found Lowrey, an old customer of Strang, in the wool business; Lowrey had an individual account with our firm down to the time of our failure.

Q. What was the amount due by Lowrey on the 4th June, 1875?

Excluded as immaterial; defendants duly excepted.

Q. Did your advances to Daniel Lowrey on the 31st of March, 1875, amount to $24,850.21?

Excluded as immaterial; defendants duly excepted.

Q. Do you remember seeing the letter of March 1st?

A. I don't remember it; the four notes sent in response to

18 that letter were taken by me to the note brokers; they are endorsed by me; I took them to O. M. Bogart & Co., and left them for discount; I suppose they were discounted through them; they were credited in account to Lowrey & Bradner; the account of March 31st is the handwriting of Larned, the bookkeeper; I have not seen him since we failed, and don't know whether he is living or dead; as to the second batch of notes, dated March 13, 14, 16, and

20, I endorsed them, and took them to the note brokers—the same broker.

Q. Do you know what these notes were obtained for?

A. To take up or replace——

Plaintiffs objected that it can only be proved by the correspondence; objection sustained; evidence excluded; defendants duly excepted.

A. I never saw the letter of April 2d until this trial.

Q. Were these last four notes which you received in April, 1875, obtained for any other purpose than to take up other notes of Lowrey & Bradner, which were maturing?

Objected to that the letter is the only competent evidence, and is not open to explanation or qualification; objection sustained; evidence excluded; defendants duly excepted.

Q. Was there any intention of deceiving or defrauding Lowrey & Bradner, or either of them, in obtaining these four notes?

Plaintiffs objected on the ground that this was not the gentleman who had the intent; objection sustained; evidence excluded; defendants duly excepted.

JOSEPH HOLLAND, sworn and examined for defence.

I am clerk for the American Express Company, at a salary of $50 a month.

19 Objected to, struck out, and defendants duly excepted.

In 1874 and 1875 I was in the wool business; I entered the wool business April 1, 1873, the firm previously, Strang & Holland, became Strang & Holland Brothers; I continued in it until it failed; I was discharged in bankruptcy June 1, 1877.

Discharges of Joseph Holland, John B. Holland, Peter O. Strang, read in evidence; it is admitted that these are the discharges which are set forth in the answer.

I knew nothing about the writing of these three letters. I never saw them before this trial; I had nothing to do with making advances or discounting paper beyond entering the discounts on the bill book or check book as received from the bank or broker where the paper was discounted; I had nothing to do with the management of the financial part of the business.

Q. Had you any intention at any time of deceiving or defrauding these plaintiffs in respect to these notes?

Excluded, on the ground that he had no knowledge of the act constituting the alleged fraud. Defendants duly excepted.

PETER O. STRANG sworn for defence:

I reside at Spuyten Duyvil, where I have resided since 1860; I am 52 years old, and one of the defendants; I was in the wool commission business in 1875, and had been in that business since 1856;

prior to that, I was a clerk for Bradner & Furman; the Bradner of that firm was plaintiff's uncle.

I first made his acquaintance in 1850; my business with A. H. Bradner began with my first firm of Lowrey, Strang & Co.; the plaintiff Lowrey was one of my partners in that firm.

20 Q. How is this wool business transacted?

A. The wool is consigned and advances made by cash or the acceptance of time drafts. Our dealings with Lowrey & Bradner began in 1872, when our firm was Strang & Holland. Prior to that we dealt with Lowrey individually.

I heard the testimony of Bradner that the eight notes for the amounts mentioned commenced running in 1873, during the first year of the existence of Strang & Holland Brothers.

Q. Was that number of notes and amounts running occasionally from that time down to the time of your failure?

A. I think so; I have not looked very closely. These notes arose in the first instance by a sale of Buenos Ayres sheepskins to Lowrey & Bradner for over $30,000.

The contract was made in January, 1873, and turned over April 1st to the new firm of Strang & Holland Brothers, and completed by them. The account of Lowrey & Bradner was also transferred to the new firm.

Question by the COURT: Do you say the eight notes represent about the amount of that contract?

A. No, sir; I say there were certain notes created about that time. I haven't named the amount of the notes received.

Question by DEFENDANT'S COUNSEL: What amount of notes was created in connection with that contract?

A. I can't recollect; by looking at the book I make out that the notes given on account of the purchase of sheepskins, during the period that the contract ran, was about $22,000 or $23,000; I have not footed it; the carrying of those notes along was conducted by receiving new notes and getting them discounted either at the bank or through brokers; Lowrey & Bradner made the notes and we had them discounted at the Leather Manufacturers', Dry Goods or National banks, where we kept our accounts, or at Bogart's as note broker;

21 they were discounted through John B. Holland, who attended to that, and I am not conversant with that; I attended to the discount at bank and he attended to the discount at the note brokers; the letter of March 1st was written by me, all of it; the reference to "your notes given to us and credited in account" is to the same notes for the same amount as are described in the account of March 31st; the notes referred to in that letter are the same amounts and dates as those in the account, and are the same; to meet those six notes, I called for six notes to be due from June 4th to June 29th, but received only four of those notes at first; when I received those four notes I credited them in account; this is the credit under date March 8th, that is the day I received them; that entry was made by the book-keeper in the usual course of the business.

Q. What was done with the notes after they had been credited in the account?

A. That I can answer only from recent investigation of it; they were placed in the hands of a broker by John B. Holland; he probably received them from me or helped himself to them.

Q. In your letter of March 1st, you say also "make them payable at our office, 142 Duane street," and the four notes sent in response to that letter, and which have been produced, are so made payable; then in the letter of April 2d, you say "make the notes payable at the Metropolitan National Bank, New York," and the four notes that were sent with the letter of April 8th are made payable at that bank; can you state why that difference of direction was given in those two letters?

Objected to, that the letters speak for themselves, and that no explanation is competent or admissible.)

Evidence excluded. Defendants duly excepted.

22 Q. This letter of 2d of April says: "I dare not offer the notes we have of yours where the last that run off were used, because the place where these are payable is at our office, and it would put them on inquiry at once;" will you explain that clause?

Objected to as inadmissible. Objection sustained. Evidence excluded. Defendants duly excepted.

Q. Was it your purpose in writing that letter of the 2d of April to have Lowrey & Bradner send you four notes to renew the two notes due March 24th and 29th, mentioned in the letter of March 1st, and the two notes that matured April 2d and 8th, or was it your purpose or intention to obtain four notes in place of the four notes that had been sent to you in response to your letter of March 27th?

Objected to, that letters speak for themselves and as incompetent. Objection sustained. Evidence excluded. Defendants duly excepted.

Q. Had you any intention of deceiving Lowrey & Bradner, or either of them, in writing this letter of March 27th?

A. No, sir.

Q. Had you any intention of deceiving them, or either of them, in writing the letter of April 2d?

A. No, sir.

Q. Had you any intention of deceiving them, or either of them, in writing any of those letters?

A. No, sir.

Q. Was there anything out of the usual course of the dealings between you and them in your calling their attention to those matured and maturing notes?

A. Nothing at all out of the usual course.

Q. You had done it before, and when the notes were transmitted you used them?

A. Yes, sir.

Q. And when these notes were transmitted they were used in the same way?

A. Yes, sir.

Q. You were discharged June 1, 1877, and this is your discharge?

A. Yes, sir.

Read in evidence. The discharge is set out in the answer, and all these discharges are to be referred to on the argument of the appeal without being again printed in this case.

Cross-examined:

When our firm made sale of wool for customers we credited them with the proceeds; wool in our hands, for sale, was not credited until sold, so that an account rendered would not take notice of the property we had in our hands for sale.

The account of June 30th shown the witness.

I see that there are four notes credited in that account to Lowrey & Bradner; the notes sent to us in answer to my letter of March 1st are not in that account; on the account of June 30 only four notes appear, and these are the four notes last sent to us.

The testimony being closed, Mr. Forster moved to dismiss the complaint—

1st. Because the cause of action is not established.

2d. Separately on behalf of John B. Holland, because no cause of action is made out against him, which was not discharged by his discharge in bankruptcy, granted June 1, 1877.

3d. Separately on behalf of Joseph Holland, because no cause of action is made out against him, which is excepted by law from the operation of his discharge in bankruptcy.

4th. Separately in behal of Peter O. Strang, on the same ground.

5th. Because there is no representation contained in the letter of April 2d, or in any other of the letters produced, which was either material to the issue of the four notes in question, or on which plaintiffs had any right to rely as a representatation; that the legal construction of the letter of 2d April is, that it was a request by Strang to Lowrey to send four notes having about three months to run, payable at Metropolitan Bank, to be used to renew the last two notes of March and the first two of April, and that Lowrey's letter in reply, enclosing the four notes "as ordered," made a specific application of those notes to that purpose; that they were so applied, and were so credited in the accounts; that the account was never objected to, but became stated and conclusive on the parties, and that it was too late when this suit was brought, June 3d, 1878, to open that account; that no fraud is proven, and there is no evidence to justify any presumption of fraud, nor any evidence to be left to the jury on which they can find any false representation of any material fact in regard to the issue of the four notes or of any fraud or fraudulent intent; that on the evidence the transaction was a

Q. What was done with the notes after they had been credited in the account?

A. That I can answer only from recent investigation of it; they were placed in the hands of a broker by John B. Holland; he probably received them from me or helped himself to them.

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Q. Had you any intention of deceiving Lowrey & Bradner, or either of them, in writing this letter of March 27th?

A. No, sir.

Q. Had you any intention of deceiving them, or either of them, in writing the letter of April 2d?

A. No, sir.

Q. Had you any intention of deceiving them, or either of them, in writing any of those letters?

A. No, sir.

Q. Was there anything out of the usual course of the dealings between you and them in your calling their attention to those matured and maturing notes?

A. Nothing at all out of the usual course.

Q. You had done it before, and when the notes were transmitted you used them?

A. Yes, sir.

23 Q. And when these notes were transmitted they were used in the same way?

A. Yes, sir.

Q. You were discharged June 1, 1877, and this is your discharge?

A. Yes, sir.

Read in evidence. The discharge is set out in the answer, and all these discharges are to be referred to on the argument of the appeal without being again printed in this case.

Cross-examined:

When our firm made sale of wool for customers we credited them with the proceeds; wool in our hands, for sale, was not credited until sold, so that an account rendered would not take notice of the property we had in our hands for sale.

The account of June 30th shown the witness.

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24 4th. Separately in behal of Peter O. Strang, on the same ground.

5th. Because there is no representation contained in the letter of April 2d, or in any other of the letters produced, which was either material to the issue of the four notes in question, or on which plaintiffs had any right to rely as a representatation; that the legal construction of the letter of 2d April is, that it was a request by Strang to Lowrey to send four notes having about three months to run, payable at Metropolitan Bank, to be used to renew the last two notes of March and the first two of April, and that Lowrey's letter in reply, enclosing the four notes "as ordered," made a specific application of those notes to that purpose; that they were so applied, and were so credited in the accounts; that the account was never objected to, but became stated and conclusive on the parties, and that it was too late when this suit was brought, June 3d, 1878, to open that account; that no fraud is proven, and there is no evidence to justify any presumption of fraud, nor any evidence to be left to the jury on which they can find any false representation of any material fact in regard to the issue of the four notes or of any fraud or fraudulent intent; that on the evidence the transaction was a

proper one in the ordinary course of business, and assented to by plaintiffs as such.

Motion denied; defendants duly excepted.

The defendant, John B. Holland, duly and specifically excepted to the denial of the separate motion in his behalf.

The defendant, Joseph Holland, duly and specifically excepted to the denial of the separate motion in his behalf.

The plaintiff proved that the amount paid by them to take up the four notes, with interest at 6 per cent. per annum, amounted to $17,518.88.

25 The court charged the jury as follows:

GENTLEMEN OF THE JURY: This action is brought by this plaintiff to recover for damages which they allege they have sustained by reason of false and fraudulent representations made by the defendants. The representations which are declared upon, and relied upon as the basis and ground of this action are contained in two letters which the proof shows were addressed to the plaintiff Lowrey by the defendant Strang, one of them on the 27th of March, 1875, and the other on the second day of April of that year; the plaintiffs' firm consisted of Lowrey & Bradner, and the person here addressed as "Dear Daniel" was the plaintiff Lowrey; the defendants' firm consisted of Peter O. Strang and the Holland Bros., and the person who subscribed these letters was Peter O. Strang; it is clear from the evidence which these letters bear upon their face, and from the light which is thrown upon them by other undisputed evidence in the case, that they related to the partnership business of both concerns; that they related to dealings between the firm of which Lowrey was a member on the one hand, and the firm of which Strang was a member on the other hand; it is clear from the letters themselves, and from the evidence which throws light upon them, that they are letters in which Strang speaks for his firm to the firm of which Lowrey is a member; they are not, in any sense, individual communications, in respect to such portions of their contents as are declared upon here as false and fraudulent; they were representations made, and intended to be made, by the defendants to the plaintiffs; just at this point I may as well say what is the law in respect to the liability of partners for the fraudulent acts of their copartners, in respect to the business of their firm; they are not criminally liable; only those are criminally liable who are guilty of the fraud, who perpetrate or are engaged in perpetrating, or have guilty knowledge of the perpetration of the fraud; where the alle-
26 gation is that it is a criminally false representation, there must be knowledge that it is made and that it is false, and it must be made with the intention to deceive and defraud; and that knowledge and intention must exist upon the part of every person sought to be criminally charged in respect to the act; but such is not the law in civil actions; partners are liable for the fraudulent acts of a copartner in the business of a partnership; so that the brothers Holland stand here with an entire absence of testimony

tending to charge them with knowledge of these false representations, and that they had no such knowledge appears by their own testimony. They are, however, responsible jointly with their copartner for the fraud, if one was perpetrated by him.

These representations are contained in these two letters which I have referred to, and the particular portion of the letter of March 27th is: "The notes we have received are all good, only we cannot get money on them alone, and in the mean time we have paid about $30,000 of your notes, which these last were given to renew, in part. Hence the statement, if corrected, would be about as follows:"

And there follows a brief statement, to which is appended:

"And we have $16,000 worth of notes not used."

In the letter of April 2d occurs the language:

"Your notes which have recently run off (that is, fallen due) I might get renewed if you would send me, say, four notes, having about three months to run, and payable at the Metropolitan Bank, N. Y. I might use them. Have them about $4,000 each, but let the amount be odd."

The same letter contains the language: "I dare not offer the notes we have of yours where the last that run off were used, be-
27 cause the place where these are payable is at our office, and it would put them upon inquiry at once."

It is alleged by the plaintiffs that these statements thus contained in these two letters were to the effect that the defendants then had on hand, which they had not used, notes of the plaintiffs to the amount of $16,000; and, further, that the letter of April 2d contains the statement that they are not able to use the notes which they have on hand for the purpose and in the manner in which they would otherwise use them, by reason of their being payable at the office of the defendants, and therefore they ask for four other notes, which shall be payable at a bank; the suggestion being that the notes they have on hand are such by reason of their being payable at the defendants' office, as would put persons to whom they were offered for sale upon inquiry as to the character of the notes and the circumstances under which they were given, and that thus there would be interference with such a sale of the notes as the defendants would desire to make.

The first question for you to decide in this case is whether these representations were made substantially as alleged in the plaintiffs' complaint. I understand that these written representattons contained in these two letters are substantially the representations which are alleged in the complaint, and if so, then these letters furnish evidence which is conclusive and undisputed that the representations were made substantially as alleged in the complaint, the particular representation being, as you will observe, that four notes of $16,000, made by these plaintiffs, were still in the hands of the defendants, and had not been used by them, and that there was a reason arising out of the form in which the notes were drawn why they could not be used as the defendants desired to use them. If you find upon this evidence that the representation was made sub-

ssantially as alleged in the complaint as the ground of the action of the plaintiffs, the next question will be, was this representation false?

28 That is the allegation of the plaintiffs; the burden of proof is upon the plaintiffs to satisfy you by a clear preponderance of the evidence that the representations were false. If this statement of the notes being on hand to the amount of $16,000 referred to the notes sent to the defendants in response to the letter of the defendants of March first, the evidence is undisputed that the statement was not in accordance with the fact, for the undisputed evidence is that those four notes had all been sold and disposed of before either of these letters was written, sold to the witnesses who testify upon commission, or in one case to a bank represented by one of those witnesses as one of its officers. The reasons given in the letter of April 2d why the notes could not be used is not directly material upon either of these questions, perhaps, but it is evidence which you have a right to consider, and which you must consider in determining what was the knowledge of the defendant Strang when he made this representation, and what was the purpose and motive with which the representation was made. That is to say, if you find him not merely making the direct statement in the letter of the 27th of March that they had notes to the amount of $16,000 on hand, but stating in the letter of April 2d why these notes are on hand, and why they have not disposed of them, or cannot dispose of them, it may be said to add to the deliberation with which the statement was made, and is important evidence upon the alleged guilty knowledge of the defendant Strang. That statement may also be important in enabling you to determine what the notes were, spoken of in the letter of March 27th, as being on hand.

"And we have $16,000 worth of notes not used;" and in the letter April 2d: "We dare not offer the notes we have of yours where the last that run off were used, because the place where they are payable is at our office."

29 It appears by the letter of March 1 that the notes which the defendants requested should be made and sent to them were to be notes payable at the office of the defendants, and if there were doubt in the case whether those notes referred to in the letter of April 2d as amounting to $16,000 were the four notes sent under the request of March first, the statement in the letter of April 2d might enable to decide that question of the identity of the notes.

I have said the second question for you to decide is, was this representation in regard to these notes true; whether they were the notes called for by the letter of March first, or whatever notes were referred to in the letter of March 27th, as being on hand and not used.

Is there any evidence in the case that there were any other notes than those called for by the letter of March first, which were still in the possession of the defendants and not used? There certainly is no such evidence. The whole evidence must be said to show, I believe, without question, that at the time that letter of March 27th was written, there were no notes of the plaintiffs on hand and not

used. The whole evidence in respect to the accounts shows that all the notes sent prior to the fifth of March (the day on which it is supposed the four notes in question were sent) had been negotiated and used and some of them had fallen due. Others of these notes are spoken of as to become due, and the plaintiffs are called upon to furnish means to meet them. There is, probably, no room to question that at the time this letter of March 27th was written, in which the statement was made that the defendants had $16,000 of notes of the plaintiffs which had not been used, there were no notes in their hands which had not been used, because the evidence shows that the four notes sent on the 5th of March had then all been negotiated and sold.

If you find that this representation was made by the de-
30 fendants and that it was false, the next question is, did the defendant Strang in making that representation know it to be false; is there any doubt of that, upon all the evidence in the case, taken with the evidence of Mr. Strang himself, when he says all these notes had been sold and negotiated, and especially that the notes sent on the 5th of March had been sold and disposed of. Can there be any question that he knew the falsity of that representation?

In order that the plaintiffs may recover it is necessary for you to find not only that the representation was false, and known to be false, but that it was made with an intention to induce some action on the part of the plaintiffs, to do something which might result in pecuniary loss or injury to them. In answer to that question you will again examine this correspondence, and particularly this letter of April 2d; and it is in that respect, probably, that the last clause of that letter, to which I have referred, will be found important by you. It purports to give a reason why the notes which he says they have on hand are not such as they desire for the purpose for which they wish to use them; and that is the letter which contains the request to send on four notes, which were sent at the time in proof, shortly after the letter of April 2d was written. Was this representation made with the intention of inducing the plaintiffs to make the last four notes which are in evidence here, which were sent on at that time, ofter the letter of April 2d was written? If it was so, then I charge you that this element of a cause of action on the part of the plaintiffs is made out by the evidence.

The next point on which the plaintiffs must satisfy you, in order to a recovery, is, that they believed and relied upon the representation made to them, and that they acted upon it, and that by reason of acting upon the representation thus made and thus relied upon, they have been subjected to a pecuniary loss.

31 The plaintiffs allege that they did rely upon this statement, namely: That four notes were then in the hands of the defendants and not used, and that they would not be used because they were not of the character which was best adapted to enable the defendants to use them, and that thus relying upon that representation, they were induced to make and forward to the defendants the four notes which are last in evidence in the case.

As to whether the plaintiffs did thus rely upon the statement, you have their own testimony, to which such weight should be given as you in your judgment shall decide. You are also to decide the question in view of whatever circumstances there are in the case, showing the actions of the plaintiffs. You are to consider the relations between the plaintiffs and the defendants, their relations in respect to the account which existed between them at that time, and all these circumstances to which a good deal of time has been given in putting the testimony before you, all these circumstances which tend in any manner to throw light upon the question whether the plaintiffs relied upon this representation that the notes sent early in March had not been used, and relied upon it as an inducement to execute the notes made early in April.

The precise representation alleged by these plaintiffs as the one which has resulted in their injury, made by the defendants, was to the effect that the defendants had not used $16,000 worth of notes, and it is said that these were the four notes made early in March.

It is alleged that that representation was false, and shown to be so by the proof which establishes the fact that these four notes had been used, that they had been sold, and the avails received by the defendants before the representation was made. It is further alleged that the defendant, Strang, knew the fact that the notes had been used when he said they had not been, and it is claimed, therefore, that the representation was false, and known by him to be false,
32 and that it was made with the design to induce the plaintiffs to make the four notes which were made in April.

If you find all these four facts established by the evidence, the only remaining question is, have the plaintiffs, by their action thus induced by the false and fraudulent representations of the defendants, been subjected to a pecuniary loss?

The evidence is that they did make the four notes called for by the letter of April 2d, that they forwarded them to the defendants, who sold them to different parties, and that the plaintiffs were thereafter called upon to pay those notes, and did pay them in part.

They paid upon them, as the uncontradicted evidence shows, sixty per cent. of the amount of those notes at the time when the payment was made, that is sixty per cent. of the sum to which three of the notes amounted, with interest calculated thereupon up to the time when the sixty per cent. was paid, and the amount thus paid has been computed in this case. Upon the fourth of the notes, the plaintiffs made a defense, being sued upon it, and were finally obliged to pay it in full with costs; but for the costs thus made, the defendants are not liable.

The measure of damages in the case will be, if you find the facts established which I have stated to you as necessary to a recovery on the part of the plaintiffs, the actual amount of money which these plaintiffs paid upon the notes which they thus made in April, with interest from that time to the present, calculated at the rate of six per cent. per annum.

Interest upon a claim of this kind is allowed only by way of damages, and is computable, I suppose, and so charge you, only at the

legal rate of interest obtaining at the time when the damages are assessed, and the legal rate now obtaining in this State is six per cent. per annum.

33 There has been a great deal of evidence in the case which has related to the condition of the accounts between the firms at the time the representations were made.

The condition of the accounts between the parties at that time is not directly material upon the question as to whether the plaintiffs are entitled to recover in this action; even though the plaintiffs were at that time indebted to the defendants, the defendants had no right to collect that debt, by means of fraudulent representations; even though the plaintiffs were indebted to them to the full amount of the notes made by them, as is claimed in consequence of this alleged fraudulent representation, that fact would not necessarily absolve the defendants from liability in this action. The defendants may not collect a debt by means of fraudulent representation or induce the plaintiffs to execute notes by means which are false, and known to be so, and intended to deceive. There is no offset of indebtedness to be made in an action for fraudulent misrepresentation, and the existence of such debt at that time, if payment of the debt was obtained by fraudulent representations, would not defeat an action by the parties defrauded. The condition of the accounts between the parties is evidence, however, which you may consider as bearing collaterally, and as a circumstance upon the questions which are submitted to you to decide, upon the question whether these representations were made with the intention to deceive and defraud, and upon the further question whether those representations were accepted and relied upon by the plaintiffs as true and constituted the basis of their action in the premises. That the representation was made that the defendants had on hand $16,000 of the notes of the plaintiffs, is established beyond contradiction; that it was not true, is equally established, and the question of the state of the accounts between the parties can have no bearing upon either of those questions. Whether that representation was known to

34 be false by the person who made it, and whether it was intended by him to deceive the plaintiffs, and to induce them to make these notes the loss upon which is complained of, including the course of dealings between the parties, and the condition of the accounts between them, may be and should be considered by the jury. These accounts, which were rendered by the defendants to the plaintiffs, are in evidence before you, and have been commented upon by counsel in the course of the trial, and by one of the counsel in summing up before you, and those accounts will be before you in considering the case, and whatever evidence you find in them bearing collaterally upon these questions which I submit to you, such evidence you will deduce from them and apply it with the force to which it is entitled.

It is said that the statement of account of June 30, rendered by the defendants to the plaintiffs, contained a true statement of the condition of the account at the time between the parties, and that it was accepted by the plaintiffs, and was never objected to by them,

but was acquiesced in by them, and that therefore they have no cause of action against the defendants for the fraud of which they complain.

I have said to you that, although the plaintiffs might have been indebted to the defendants at that time, and although these notes were obtained by the defendants by this fraud and applied in payment of that debt, that would not deprive the plaintiffs of their action which they have here brought, unless, after the notes had been thus applied in payment or credited upon a debt which they owed the defendants, the plaintiffs had consented to such application or credit. If there is any evidence in the case that the plaintiffs ever consented to the use which was made of these notes by the defendants, and consented, in view of and with knowledge of the fraud which had been perpetrated upon them, to the application of the notes in payment of or as credit upon a debt due from them to the defendants, that would undoubtedly be a settlement,
35 and operate as a discharge of the cause of action upon which this action is brought. I submit to you whether there is any evidence of such a consent on the part of the plaintiffs, whether the mere fact that after the receipt of this statement of account, made on the 30th of June, which succeeded this transaction, and succeeded the insolvency of the defendants, they did not make a claim upon the defendants for the notes, or for their proceeds, constitutes such a consent to the use of the notes thus procured from them. I submit the question to you upon all the evidence in the case.

It is said that the defendants procured the four notes of April from the plaintiffs, not for the purpose of substituting them for the four notes of March, but for the purpose of taking up and renewing other notes made by the plaintiffs before the time. I charge you that the purpose which these defendants may have had in reference to the object to which they should apply the notes which they procured from the plaintiffs in April, is not material. The question is, whether they procured those notes, for whatever purpose they designed them, without the plaintiffs' knowledge of the true state of affairs in reference to the other four notes, made in March—the question, in other words, is this: Did these plaintiffs make the four notes of April, which they were afterwards compelled to pay, upon this representation that the four notes made by them in March were retained and not used by the defendants? Would they have declined to make the notes of April if the representation had not been made to them that the notes of March remained in the hands of the defendants, and were not used? If so, then the purpose for which the defendants took and received the notes, or the purpose to which they applied them, is immaterial in the case.

You will see that this case is a very much simpler one than you may have imagined at some stages of the trial. You will perceive that a great portion of the evidence here which relates to the
36 course of dealing between the firms, and to the state of the accounts between the firms at the time the notes were procured, bears only collaterally and circumstantially upon the real question in the case. The real questions are: Were these repre-

sentations made as the letters show? Was this particular representation made; that notes to the amount of $16,000 were then in the hands of the defendants and not used? Was this representation false? Was it known to Mr. Strang to be false? Did he make it with the intention of inducing the plaintiffs to make four other notes? Did the plaintiffs rely upon the representation and statement, and, relying upon them, did they make the four additional notes? And would they have declined to make them if the representations had not been made? In making them have they been subjected to loss in the sum stated in this case?

If the plaintiffs are entitled to recover, they are entitled to recover against all the defendants, upon the facts of this case, the sum of $17,517.86. If you shall find that the defendant Strang did not know this statement to be false when he made it, or that he did not make it intending to induce action on the part of the plaintiffs which might result to their injury, or that the plaintiffs did not rely upon that statement, and make these notes of April in consequence of such reliance, notwithstanding they were subjected to the payment of such notes thereafter, you would find a verdict for the defendants.

It seems undoubtedly a hard rule in many cases, and possibly this is one of the strong cases, that men who have no knowledge of the perpetration of a fraud should *should* be held responsible with the party who had full knowledge, but is one of the burdens which a man assumes when he enters into the intimate relation of copartnership in business. He assumes the responsibility, civilly, of even fraudulent acts committed in the course of the business by his copartner.

37 Mr. Forster excepted on the part of the defendants Holland to the charge, that it was clear from undisputed evidence that the letters related to the partnership business, and that Strang spoke for his firm, and that they were not in any respect individual communications, and asked that the question should be left to the jury.

Declined; exception by defendants. Also excepted on the part of the defendants Holland to the application of the law in regard to the liability of the partners, in that there was an omission to make qualification of it by reason of the bankrupt act, and asked the court to charge that only a debt created by the fraud of a bankrupt was excepted, and that a debt created by the fraud of his partner was not excepted.

The court declined so to charge, to which refusal the defendants excepted.

Also to the charge that the defendants Holland were responsible jointly for the fraud of their copartner, if one was perpetrated by him.

Mr. Forster asked the court to charge the jury that if the sum of $16,000 referred to the notes due March 5, 8, 10, and 13, of $4,000 each, making the sum of $16,000, which were then in the hands of the

defendants, and of which there is no evidence that they had been used, then the defendants were entitled to a verdict, inasmuch as the representation alleged in regard to the $16,000 was true and not false.

The court declined to vary the charge in the respect mentioned, and the defendants duly excepted.

Mr. Forster further requested the court to charge that if the account of March 31 was before the defendants on the first of April, as shown by the uncontradicted evidence, the credits upon that account of the first four notes was notice to the plaintiffs that the de-
38 fendants had used those notes, as they had the right to use them, and that in that respect the account was direct evidence upon the main issue in the case.

The COURT: I will submit that as evidence upon that question, but it is to be taken in connection with the evidence of Bradner, that he had that statement and considered it in connection with the letters of March 27th and April 2d, and therefore believed the notes had not been used.

Mr. Forster excepted to the qualification, and asked the court to charge that they were bound by that statement, and had no right to rely upon any matters stated in the letters as contrary to that statement in the account. The presiding justice declined so to charge, to which refusal the defendants duly excepted.

Mr. Forster requested the court to charge as to John B. Holland, that there being no claim of any fraud perpetrated by him, and no evidence of any fraud perpetrated by him, this is not a debt created by his fraud, and he is not liable in this action, but is discharged by his discharge in bankruptcy from all liability in this action.

The court declined so to charge, to which refusal the defendant, John B. Holland, duly excepted.

Mr. Forster made the same request as to Joseph Holland.

The court declined so to charge, to which refusal the defendant, Joseph Holland, duly excepted.

Mr. Forster requested the court to leave to the jury the question whether the acceptance of the accounts was a consent to the application of the notes.

39 The COURT: I submit to the jury the question upon these accounts, whether the application of the notes was consented to by the plaintiffs, and I have submitted that question to them in my charge. Mr. Forster excepted.

Mr. Forster requested the court to charge that the acceptance of these accounts without objection was evidence of the consent to the application as stated in the account, and that if the jury should find on such evidence of the acceptance of the account that there was such consent, the verdict should be for the defendants.

The court refused to vary the charge, to which refusal, and to the refusal to charge as requested, the defendants duly excepted.

Mr. Forster requested the court to charge that the course of dealing between the parties, from the time when the dealing commenced in 1873, was direct evidence bearing upon the question whether or not Lowrey & Bradner would have declined to make the notes, but for some statements made in the letters.

The COURT: I have submitted the matter of the course of dealing upon that precise question, and I do now.

Mr. Forster requested the court to charge that the statements in the letters, whatever they referred to, if the jury should find that they intended to represent that the defendants were unable to use the notes, or had not used the notes, were wholly immaterial and insufficient to sustain the action.

The court refused so to charge, to which refusal the defendants duly excepted.

Mr. Forster requested the court to charge that the letters produced did not sustain the allegations contained in paragraph 6 of the complaint, and that the letter of April 2d did not ask for the four notes in place of the four notes sent to the defendants in March, but to be used to renew four entirely different notes from the notes intended to have been renewed by the four notes sent in March.

The court declined so to charge, to which refusal the defendants duly excepted.

Mr. Forster requested the court to charge that the accounts between the parties, as rendered on the 31st of March, 1875, and 30th June, 1875, being received, accepted, and not objected to by the plaintiffs prior to the commencement of this action on the 3d of June, 1878, have become stated long since, and were binding and conclusive upon the parties when this action was commenced.

The court refused so to charge, to which refusal defendants duly excepted.

Mr Forster requested the court to charge that the method in which the notes running since 1873 had been renewed down to March 1, 1875, had established a course of dealing between these parties which was reasonable and customary and binding upon the parties.

The court declined so to charge, except as charged, to which refusal the defendants duly excepted.

Mr. Forster requested the court to charge that the plaintiffs had, on the first of March, 1875, when the letter of that date was written, eight notes running to maturity, to wit, $4,000 due March 5, $4,000 due March 8, $4,000 due March 10, $4,000 due March 13, $4,250 due March 24, $4,251.32 due March 29, $4,251.33 due April 2, and $4,200 due April 8, given by them to Strang & Holland Bros., and credited to the plaintiffs in the accounts, the first four, in the account of De-

cember 18, 1874, under date of December 7, 1874, and the last
41 four, in the accounts of January 30, 1875, under the date of January 4, 1875, for which provision was required.

The court refused so to charge, to which defendants duly excepted.

Mr. Forster requests the court to charge that the letter of March 1, 1875, stating that some way must be provided to pay the six of those notes due in March, and suggesting that six notes should be drawn, and the drawing of the first four so suggested, and their receipt by Stang & Holland Brothers, made a specific appropriation of those four notes to provide for the first four due March 5, 8, 10, and 13.

The court refused so to charge, to which refusal defendants duly excepted.

Mr. Forster requested the court to charge that on the evidence the four notes were so used.

The court refused so to charge, to which refusal defendants duly excepted.

Mr. Forster requested the court to charge that the jury will disregard any evidence of A. H. Bradner as to an honorable settlement, as that conversation with Strang, and to which he testifies, is not a new promise, and is not legally binding upon Peter O. Strang.

The court refused so to charge, to which refusal defendants duly excepted.

Mr. Forster requested the court to charge that it was not binding upon either John B. or Joseph Holland, as it took place long after their adjudication as bankrupts on July 30, 1875.

The court refused so to charge, to which refusal defendants Holland duly excepted.

42 Mr. Forster requested the court to charge that the letter of April 2d, 1875, suggesting ability to get the notes which had recently run off renewed, referred on the undisputed evidence to the notes of March 24th, for $4,250, March 29th, for $4,251.32, April 2d, for $4,251.33, and the suggestion of "say four notes" covered those three notes and the note of $4,200 due April 8th.

The court refused so to charge, to which refusal defendants duly excepted.

Mr. Forster requested the court to charge that the suggestion in the letter of April 2, 1875, "if you send us, say four notes having about three months to run, and payable at the Metropolitan Bank, New York, I might use them," taken with the letter of April 8, 1875, marked "Exhibit Y," enclosing the notes due March 13, 14, 16, 23, "as ordered," when received by Strang & Holland Brothers, made a specific appropriation of those four notes to provide for the four notes due March 24 and 29, April 2 and 8, and authorized their use by the defendants for that purpose.

The court refused so to charge, to which refusal defendants duly excepted.

Also, that on the undisputed evidence they were so used.

The court refused so to charge, to which refusal defendants duly excepted.

Mr. Forster requested the court to charge that the use of the four notes sent in April, or of the four sent in March, was not a fraud on which this action could be based, but it was authorized by the correspondence and the course of dealing and acts of the parties.

The court declined so to charge, to which refusal the defendants duly excepted.

Also, that the jury was not authorized to find from
43 the letters, or any of them, that any false representations were made which would justify this action.

The court refused so to charge, to which refusal defendants duly excepted.

Also, that the statements in the letter as to the use of the notes was immaterial; that the defeedants had the right to use the four notes sent to them in March, at the time and for the purpose and in the manner in which they were used, and whether the statements in the letters referred to such notes or not, the statements were not of any matter or thing material to the making or the issue of the four notes sent to the defendants in April, 1875.

The court refused so to charge, to which refusal defendants duly excepted.

Also, that the statements in the letters as to the use of the notes did not relate to or materially affect the subject-matter of the notes transmitted by the plaintiffs to the defendants in the letter of April 8, 1875, (Exhibit Y), in response to the letter of April 2, 1875.

The court refused so to charge, to which refusal the defendants duly excepted.

Also, that it was not enough for the plaintiffs to allege that they relied upon the statements in the letters; they must show further that the statements were of such character that the enforcement of the notes due July 16, 17, 19, and 23 worked a fraud upon the plaintiffs to their pecuniary injury and damage.

The court refused so to charge, to which refusal the defendants duly excepted.

Also, that to sustain such a claim of fraud the statements must have been of some matter or thing material to these four
44 notes, and must relate distinctly and directly to those notes and effect their essence and substance.

The court declined so to charge, to which refusal the defendants duly excepted.

Also, that the disposition made of the four notes asked for and obtained, to provide for the notes due March 5 to 13, did not relate at all to the use to be made of the four notes asked for to provide for the notes due March 24 and subsequent to that date.

The court refused so to charge, to which defendants duly excepted.

Mr. Foster excepted to that part of the charge in which the court said: "And therefore they asked for four notes in place of them."

Also, to the charge, "I understand that these are the representations alleged in the complaint. The letters furnish evidence conclusive and undisputed."

Also, to the charge commencing, "If the $16,000 referred to in the notes sent," etc.

Also, to the charge, "If you find him, April 2d, stating why he had not disposed ——— it adds to the deliberation, and tends to show guilty knowledge of the defendant Strang."

Also, to the question and answer, "Is there any evidence in the case, etc.? Certainly, there is no such evidence."

Also, to the proposition that there were no notes made by the plaintiffs in the hands of the defendants which had not been used.

Also, to the questions, "Is there any doubt that Strang knew it? Can there be any doubt that he knew it to be so?"

Also, to the proposition, "If it was so, then I charge you that this element of a cause of action is made out by the plaintiffs."

Also, to the proposition, "The precise representation was that the defendants had not used $16,000 notes."

Also, to the proposition, "I charge you that you are not called upon to inquire," etc.

Also, the proposition that the condition of the accounts was not directly material on the question, etc.

Also, "that the accounts can only be considered as bearing collaterally," etc.

Also, to the proposition that the purpose the defendants may have had as to the obtaining of the four notes to renew notes was not material.

Also, to the statement that the question was whether they procured the notes without the plaintiffs' consent.

Also, to the proposition that the purpose of the defendants or the use to which they applied the notes was immaterial to the main question in the case.

Also, to the proposition, would they have declined to make the notes but for their representations.

Also, to the proposition, "If so, the plaintiffs are entitled to recover against all these defendants."

These last exceptions were taken separately on the part of each of the defendants.

The jury rendered a verdict for the plaintiffs for $17,517.86.

The defendants moved to set aside the verdict and for a new trial of this action, upon the defendants' exceptions and upon the judge's minutes, which motion the court denied.

From the order denying said motion, and from the judgment entered on said verdict, the defendants respectively appeal to the general term, and this case and exceptions is made to review and reverse said order and judgment.

GEORGE H. FORSTER,
Defendants' Attorney.

The foregoing case and exceptions are hereby settled and signed and ordered to be filed and annexed to the judgment roll dated August 14, 1880.

CHARLES C. DWIGHT,
Justice Supreme Court.

(Endorsed:) Supreme court. Amariah H. Bradner and another against Peter O. Strang and others. Case and exceptions. Filed August 17, 1880.

46 Supreme Court, County of Livingston,

AMARIAH H. BRADNER and DANIEL LOWREY
vs.
PETER O. STRANG, JOHN D. HOLLAND, and JOSEPH HOLLAND.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys, within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated this 27th day of May, 1878.

WOOD & SCOTT,
Plaintiffs' Attorneys, Geneseo, N. Y.

47 Supreme Court.

AMARIAH H. BRADNER AND DANIEL LOWREY
versus
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND.

LIVINGSTON COUNTY, *ss:*

The defendants above named complain of the above-named defendants, and for a cause of action against them allege:

I. That from the month of November, 1872, to the 4th day of June, 1875, the said plaintiffs were copartners, doing business in the city of Rochester, State of New York, under the firm name and style of Lowrey & Bradner.

II. That during the same time the defendants were copartners, doing business in the city of New York, under the firm name and style of Strang & Holland Bros.

III. That the request of the defendants and for their accomodation, the said plaintiffs, on or about, the 4th day of April, 1875, made

and transmitted to the defendants, in the city of New York, four promissory notes, of which the following are copies:

"$4,850. ROCHESTER, N. Y., *March 13th*, 1875.

Four months after date we promise to pay to the order of ourselves forty-eight hundred and fifty dollars, payable at the Metropolitan National Bank, New York, value received.

LOWREY & BRADNER."

Endorsed on the back: "Lowrey & Bradner."

48 "$4,951.25. ROCHESTER, N. Y., *March* 14, 1875.

Four months after date we promise to pay to the order of ourselves forty-nine hundred and fifty-one $\frac{25}{100}$ dollars, payable at the Metropolitan National Bank, New York, value received.

LOWREY & BRADNER."

Endorsed on the back: "Lowrey & Bradner."

"$4,860.30. ROCHESTER, N. Y., *March* 16, 1875,

Four months after date we promise to pay to the order of ourselves forty-eight hundred and sixty $\frac{30}{100}$ dollars, payable at Metropolitan National Bank, New York, value received.

LOWREY & BRADNER."

Endorsed on the back: "Lowrey & Brandner."

"$4,970. ROCHESTER, N. Y., *March* 20, 1875.

Four months after date we promise to pay to the order of ourselves forty-nine hundred and seventy dollars, payable at Metropolitan National Bank, New York, value received.

LOWREY & BRADNER."

Endorsed on the back: "Lowrey & Bradner."

IV. That the said promissory notes were all transmitted at the same time, to wit, on or about the 4th day of April, 1875, and received by the said defendants very soon after they were so transmitted by the plaintiffs, as hereinabove stated; that the said defendants duly endorsed the said promissory notes, and each and every one of them, put them in circulation by procuring them to be discounted and obtained the money thereon, by means whereof the said plaintiffs became liable to pay the said promissory notes in the hands of the holders thereof; that afterward, and before the commencement of this action, the said plaintiffs paid and took up the said promissory notes, except one thereof, and that one they are made liable to pay. That the said plaintiffs received no consid-
49 eration for the said notes, but made the same at the request of the defendants and delivered them to the defendants for their benefit and accommodation; that the said defendants were under obligation and bound to pay the same at maturity;

that, as the plaintiffs are informed and believe, the said several promissory notes when they became due respectively were duly presented at the Metropolitan National Bank in the city of New York, the place where the same were made payable, for payment, and payment thereof then and there duly demanded, which was refused; whereupon the said notes were then and there duly protested for non-payment, and notice thereof duly served upon the endorsers thereof, all of which said defendants had due notice.

V. That the said promissory notes were obtained from the said plaintiffs by the false and fraudulent representations of the said defendants in the manner following, that is to say: The said defendants were commission merchants, doing business in the city of New York; the said plaintiffs were engaged in the purchase and sale of wool which was forwarded by them to the defendants, as commission merchants, to sell and account to the plaintiffs therefor; that the said plaintiffs were in the habit of furnishing the said defendants, from time to time, with their promissory notes, similar to the ones above set forth, at the request and for the accommodation of the said defendants, to enable them, from time to time, to raise money to carry on their business; that the said defendants took care of the said notes and paid the same at maturity out of the proceeds of the property consigned to them and money remitted to them by the said plaintiffs; that in the transactions between the said plaintiffs and defendants, the said plaintiffs were credited with the promissory notes so as aforesaid sent by them, and credited with the proceeds of the property consigned to the defendants and sold by them, and money remitted to them as aforesaid, and charged with the amounts paid to take up the said promissory notes. That this course of business transactions had continued from the time the plaintiffs formed their co-
50 partnership up to the time of the execution and delivery of the said four promissory notes above mentioned and set forth; that on or about the 1st day of March, 1875, the said defendants requested the said plaintiffs to furnish them, the said defendants, with four promissory notes of about four thousand dollars each, to enable them to raise money by procuring the same to be discounted and to be credited to the said plaintiffs on their account, in accordance with the course of dealings which had theretofore existed between them; that the said defendants requested the said promissory notes to be made of different dates before the time they were transmitted to the defendants in the city of New York, so that they might appear to be regular business notes, given for a *bona fide* indebtedness existing between the plaintiffs and defendants; that at the time the said promissory notes, dated in February, were requested by the said defendants, the statement of the account between the plaintiffs and defendants showed that the defendants were indebted to the plaintiffs in the sum of about seven thousand three hundred dollars; that in pursuance of the said request of the said defendants the said plaintiffs made their four promissory notes as follows, that is to say, one note of $4,325.50, dated February 1, 1875, payable in four months from date; one note of $4,326.25, dated February 9th, 1875, payable in four months from date; one note of

$4,327.13, dated February 15th, 1875, payable in four months from date, and one other note of $4,327.15, dated the 20th of February, 1875, payable in four months from date, which said promissory notes were payable to the order of the said plaintiffs at the office of the defendants, No. 142 Duane street, in the city of New York, all of which notes were endorsed by said plaintiffs.

VI. That after the said promissory notes were made, executed, and delivered to the said defendants, and on or about the 4th day of April, 1875, the said defendants stated and represented to the said plaintiffs that they were unable to use the said last-mentioned promissory notes, dated in February, for the purpose for which they
51 had been delivered to them, in consequence of their being made payable at the office of the said defendants in the city of New York, and requested the said plaintiffs to send them four other promissory notes of about the same amounts, payable at the Metropolitan National Bank, in the city of New York, and stated that they were unable to use the said promissory notes for the purpose for which they had been sent to them. And the said plaintiffs say that relying upon such representations of the said defendants, that the said notes had not been used, and that they desired four other notes to be used in the place of the notes so sent to them, made, executed, and delivered to the said defendants the four other promissory notes first hereinabove set forth.

VII. And the said plaintiffs say that the said defendants did use the said promissory notes last above referred to, and did endorse, put them in circulation, and procured them to be discounted, and the same were discounted; that the said notes were not paid at maturity by the said defendants; that the said plaintiffs were duly charged as makers and endorsers of the said promissory notes, and were made liable to pay afterward, and before the commencement of this action were compelled to pay and did pay the same.

VIII. That at the time the said defendants requested the said plaintiffs to send four other promissory notes, and at the time when they stated and represented that they could not use the said promissory notes, dated in February, as above stated, because they were made payable at their office, in the city of New York, the said defendants had used the said notes, had put the same in circulation, had procured the same to be discounted, and obtained the money thereon. That the said defendants made the false and fraudulent representations that they had not and could not use the said notes for the purpose of inducing the plaintiffs to send the four other promissory notes which were the promissory notes first hereinabove
52 set forth, for the purpose and with the intent to cheat and defraud the said plaintiffs.

IX. That the said defendants, at the time they applied for and obtained the said promissory notes, wer cutterly insolvent and unable to pay their debts; that they well knew that they were insolvent, and that they would not and could not pay the said promissory notes at maturity, and that the said plaintiffs would be compelled to pay the same; that the said plaintiffs did not know of the insolvency of said defendants.

X. That the said plaintiffs, relying upon the representations that the said four notes last above mentioned and referred to, and dated in February, had not been used and would not be used by the said defendants, and that the four promissory notes above mentioned, dated in March, would be substituted and used in their place, made and transmitted to the said defendants the four promissory notes first above mentioned and set forth, dated in March; that the said plaintiffs would not have made and transmitted to the said defendants the said promissory notes first above mentioned but for the representations of the said defendants that the four promissory notes dated in February had not been used and would not be used, so made to the said plaintiffs, as aforesaid. That by means of the said false and fraudulent representations, so made by the said defendants, as aforesaid, to the said plaintiffs, and relied upon by said plaintiffs, the said plaintiffs have suffered great loss and damage, to wit, to the amount of twenty-three thousand five hundred and thirty-five dollars.

Wherefore the said plaintiffs demand judgment against the said defendants for the sum of $4,850, with interest thereon from the 16th day of July, 1875, and the sum of $4,951.25, with interest thereon from the 17th day of July, 1875, and the sum of $4,860.30, with interest thereon from the 19th day of July, 1875, and the sum
53 of $4,970, with interest thereon from the 23rd day of July, 1875, besides the costs of this action.

WOOD & SCOTT,
Plaintiffs' Attorneys, Geneseo, N. Y.

COUNTY OF MONROE, *ss:*

Amariah H. Bradner and Daniel Lowrey, being duly sworn, depose and say, and each for himself deposes and says: That he is a plaintiff in the above-entitled action named; that the foregoing complaint is true to the knowledge of the said plaintiff, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

A. H. BRADNER.
DANIEL LOWREY.

Severally subscribed and sworn to before me, this 24th day of May, 1878.

JOSEPH S. HUNN,
Com'r of Deeds.

54 Supreme Court.

AMARIAH H. BRADNER and DANIEL LOWREY
vs.
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND.

The defendants answer the complaint of the plaintiffs in this action as follows:

First. They admit that from the month of November, 1872, to the 4th day of June, 1875, the said plaintiffs were copartners doing business in the city of Rochester, county of Monroe, and State of New

York, under the firm name and style of Lowrey & Bradner, and that the defendants were copartners doing business in the city of New York, under the firm name and style of Strang & Holland Bros.

They admit that on or about the 13th day of April, 1875, the said plaintiffs made and transmitted to the defendants in the city of New York the four promissory notes of which copies are alleged to be set forth in the complaint, but whether or not the same are correctly set forth therein they do not know, and require proof and production of the original promissory notes on the trial of this action; and pray that such original notes be taken as part of this answer. They are informed and believe that the amount of the note dated March 14th, 1876, was $4,950.25, and not $4,951.25, and they say that such notes were made, transmitted, and discounted for the accommodation of said plaintiffs to raise money for their benefit, needed to meet their obligations, and they deny that they were made or transmitted for the accommodation of these defendants. They admit that said promissory notes were all transmitted at the same time, to wit,
55 on or about the 4th day of April, 1875, and received by these defendants very soon after they were so transmitted by the plaintiffs, and that these defendants duly endorsed them for the accommodation of the plaintiffs, put them in circulation by procuring them to be discounted, and obtained the money thereon, and that plaintiffs were liable to pay the same, as between themselves and these defendants, as well as in the hands of the holders thereof; but they deny any knowledge or information sufficient to form a belief as to whether or not, before the commencement of this action, the plaintiffs paid or took up the same, or any of them, and leave the plaintiffs to make proof thereof. They deny that plaintiffs received no consideration for the said notes, or that they made or delivered them to the defendants for their benefit or accommodation. They deny that the defendants were under obligation or bound to pay the same at maturity. They admit, on information and belief, the presentation at maturity, demand, protest, and notice of protest, for non-payment of said notes, and they deny each and every allegation contained in paragraphs V, VI, VIII, IX, and X of said complaint, except as herein expressly admitted or alleged to be true.

Second. For a further and separate defense these defendants deny that the whole or any part of the sum in the complaint mentioned, or any interest thereon, is now due or owing to the plaintiffs from said defendants, because they allege, on information and belief, that on the 3d day of July, 1875, the defendant, Peter O. Strang, filed a petition in bankruptcy against the said defendants, in the office of the clerk of the district court of the United States for the southern district of New York, being the district where said defendants had resided for more than six months immediately preceding said petition in bankruptcy, under and in pursuance of the Revised Statutes of the United States, title Bankruptcy, and the amendments thereof; that thereafter such other and further proceedings were had in said court that these defendants were, on the 24th day of August,

56 1875, duly adjudicated bankrupts on said petition, all of which proceedings due and lawful notice was given to the plaintiffs by these defendants, according to the provisions and requirements of said Revised Statutes; and that thereafter such further proceedings were had in said district court in said proceedings in bankruptcy that on the 1st day of June, 1877, the said district court, by its order and final determination, duly made on that day, did forever discharge these defendants from all debts and claims which by the said Revised Statutes of the United States, title Bankruptcy, are made provable against their estate, and which existed on the 3d day of July, 1875, on which day the petition for adjudication was filed and duly made and delivered to them, under the hand of the judge of said district court, and the seal of said court, their said discharges and the order of the court therefor, which are in the words and figures as follows, to wit:

"No. 5180.

"District Court of the United States, Southern District of New York.

Whereas Peter O. Strang has been duly adjudged a bankrupt under the Revised Statutes of the United States, title Bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is, therefore, ordered by the court that the said Peter O. Strang be forever discharged from all debts and claims which, by said title, are made provable against his estate, and which existed on the 3d day of July, 1875, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

"Given under my hand and the seal of the court, at the city of New York, in the said district, this first day of June, A. D. 1877.

[L. S.] "SAMUEL BLATCHFORD,
"*District Judge.*

"Filed this first day of June, 1871, at 10 o'clock a. m."

57 "No. 5180.

District Court of the United States, Southern District of New York.

Whereas John B. Holland has been duly adjudged a bankrupt under the Revised Statutes of the United *Statutes of the United* States, title Bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that the said John B. Holland be forever discharged from all debts and claims which by said title are made provable against his estate, and which existed on the 3d day of July, 1875, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at the city of New York, in the said district, this first day of June, A. D. 1877.

[L. S.] SAMUEL BLATCHFORD,
District Judge."

"Filed this first day of June, 1877, at 10 o'clock a. m."

"No. 5180.

District Court of the United States, Southern District of New York.

Whereas Joseph Holland has been duly adjudged a bankrupt under the Revised Statutes of the United States, title Bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that the said Joseph Holland be forever discharged from all debts and claims which by said title were made provable against his estate, and which existed on the 3rd day of July, 1875, on which day the petition for ad-
58 judication was filed against him, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at the city of New York, in the said district, this first day of June, A. D. 1877.

[L. S.] SAMUEL BLATCHFORD,
District Judge."

"Filed this first day of June, 1877, at 10 o'clock a. m."

Third. And for a further and separate defense these defendants allege, on their information and belief, that these defendants, from about the time of the formation of their copartnership of Strang & Holland Brothers, and their predecessors, the firm of Strang & Holland, composed of the defendants, Peter O. Strang and John B. Holland, as commission merchants, received wool from said plaintiffs on consignment and sold the same for them on commission, and advanced them large sums of money from time to time by endorsing notes, accepting drafts, and in other ways, and of all their business with them, including, as well their advances for them, as their receipts of monies, and all credits to which said plaintiffs were entitled, accounts were rendered quarterly or thereabouts by defendants to plaintiffs, and that said transactions and all transactions between the parties to this action were duly entered in said accounts, and all the said notes mentioned in said complaint were duly entered therein, and the said notes and the proceeds thereof were duly accounted for in said accounts by these defendants to said plaintiffs. That on the 21st of December, 1874, these defendants duly rendered to said plaintiffs their account current to December 18, 1874, whereby it appeared, and these defendants aver that it was the fact, that there was a balance due to these defendants by said plaintiffs of $39,993.05, and that said account was
59 duly received by said plaintiffs, and became stated between the parties. That on the 31st of March, 1875, these defendants duly rendered to said plaintiffs their account sales and account current to that date, whereby it appeared, and these defendants aver that it was the fact, that there was a balance due to these defendants by said plaintiffs of $34,372.86, and that said account was duly received by said plaintiffs, and became stated between the parties; that by the subsequent accounts between the parties, the said plaintiffs were fully credited with said notes intended to be described in

the complaint, and that after such credit of said notes said plaintiffs were, on said 13th day of April, 1875, indebted to these defendants in the sum of $6,223.64, and that if said notes had not been credited to said plaintiffs as payable by them, the sum then due these defendants by said plaintiffs would have been $25,854.19, and that said plaintiffs are now indebted to these defendants in the sum of $13,301.21, on all their mutual transactions, as appears by the accounts hereto annexed as part of this answer, and marked "Exhibit A."

Fourth. For a further and separate defense, and by way of counter-claim, these defendants allege that between December 1, 1874, and June 30, 1875, these defendants advanced and loaned to said plaintiffs, and paid out for said plaintiffs at said plaintiffs' request, large sums of money at the times and of the amounts set forth in the accounts annexed hereto as part of this answer, and marked "Exhibit A," and that there still remains wholly unpaid thereon, except by said notes, intended to be described on the complaint, the sum of $32,931.76, and after crediting said notes there yet remains wholly due, owing and unpaid, the sum of $13,301.21, with interest thereon from June 30, 1875.

Wherefore these defendants counter-claim and demand
60 judgment against said plaintiffs for said sum of $13,301.21, with interest from June 30, 1875, and for the dismissal of the complaint, and for the costs of this action.

GEORGE H. FORSTER,
Defendants' Attorney.

CITY AND COUNTY OF NEW YORK, *ss.:*

John B. Holland, of said city, being duly sworn, says: I am one of the defendants who are united in interest in making the foregoing answer, and have read the same, and am acquainted with the facts; that the same is true to the knowledge of deponent, except as to the matter therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

JOHN B. HOLLAND.

Sworn to before me, this 20th day of June, 1878.

WILLIAM H. FLINTER,
Notary Public (82), *N. Y. County.*

61 & 62 EXHIBIT

Dr. Messrs. LOWREY

1874.				
December	18.	168	Balance account as cash	$39,993 05
	18.	96	Cash, segars	17 00
	24.	97	" paid their note	4,050 00
	24.	169	Our acc'pce due M'ch 25	4,150 00
	26.	97	Cash exchange on $5,000	12 50
	28.	169	Our accep'ce due Feb'y 27	5,000 00
	28.	97	Cash p'd their note	3,975 00
	29.	97	Ex'ge on $5,000	13 33
	30.	170	Our acceptance due M'ch 2d	5,000 00
	31.	171	" " " Feb'y 17	4,000 00
	31.	171	" " " Ap'l 3	4,985 00
	31.	98	Cash p'd their note	3,950 00
1875, Jany	2.	1	Ex'ge on $5,000	12 50
	5.	1	Cash paid their note	4,050 00
	5.	1	Ex'ge on $5,000	12 50
	5.	174	Our acceptance due March 8	5,000 00
	8.	174	" " " Jan. 14	5,000 00
	8.	174	" " " April 5	3,860 00
	9.	1	Cash ex'ge on $5,000	22 22
	12.	2	" paid draft	5,000 00
	12.	2	Ex'ge of $5,000	11 11
	15.	2	Cash p'd their note	3,950 00
	15.	2	Paid their draft	2,500 00
	19.	2	Cash ex'ge on $5,000	22 22
	22.	177	Our acceptance due M'ch 25	5,000 00
	25.	3	Cash ex'ge on $3,000	15 00
	28.		Cash paid draft	3,000 00
	30.	3	Ex'ge of $5,000	25 00
	30.	179	P'd their note due Jan. 19	4,150 00
	30.	179	" " " " " 23	3,850 00
	30.	180	L. & B. fleece W. acc't as cash	7,477 19
			Balance interest	172 78
				$128,276 40
January	30.		Balance new account	$53,709 67

A 63

& BRADNER. *Cr.*

1874.				
December	26.	97	Cash per draft	5,000 00
	29.	97	do do	5,000 00
	29.	97	do do	3,000 00
	29.	169	P. O. S. Cash Aug. 20	50 00
	31.	172	Sale No. 253 due Jan. 18, 75	5,564 08
1875.				
January	1.	1	Cash per draft	5,000 00
	4.	174	Note due M'ch 24	4,250 00
	4.	174	do do do 27	4,251 32
	4.	174	do do April 2	4,251 33
	4.	174	do do do 8	4,200 00
	5.	1	Cash per draft	5,000 00
	9.	1	do do do	5,000 00
	12.	2	do do do	2,500 00
	18.	2	do do do	4,000 00
	19.	2	do do do	5,000 00
	25.	3	do do do	3,000 00
	30.	3	do do do	5,000 00
	30.	179	P. & L. all'ce as cash	4,500 00
	30.	180	Balance to new acc't	53,709 67

128,276 40

64 EXHIBIT A—

Dr. Messrs. LOWREY

1875.				
January	30.	180	Balance as Cash	53.709 67
Feb'y	3.	4	Cash paid draft	5,000 00
	13.	5	Cash ex'ge on $5,000	25 00
	17.	"	Cash paid d'fts	5,000 00
	18.	"	Cash ex'ge on $5,000	25 00
March	1.	7	Cash ex'ge on $5,000	25 00
	2.	7	Cash ex'ge on $5,000	25 00
	5.	7	Cash paid d'ft	5,000 00
	"	7	Cash paid d'ft	5,000 00
	8.	8	Cash paid their note	4,000 00
	8.	8	Cash paid ex'ge on $5,000	25 00
	8.	8	Cash paid ex'ge on $5,000	6 25
	11.	8	Cash paid their drafts	10,000 00
	11.	186	Cash on acceptance due May 8	4,678 30
	19.	9	Cash ex'ge on $10,000	30 00
	23.	9	Cash paid their draft	5,000 00
	23.	9	Ex'ge on $5,000	25 00
	23.	187	Acceptance due April 24	5,500 00
	23.	187	Acceptance due May 24	5,500 00
	24.	9	Cash paid their note	4,250 00
	26.	9	Cash paid their d'ft	5,000 00
	29.	10	Cash paid their note	4,251 32
	30.	188	Their note due March 5	4,000 00
	30.	188	Their note due March 10	4,000 00
	30.	188	Their note due March 13	4,000 00
	30.	188	Our acceptance due May 25	4,518 26
	31.	189	Bal. of interest	1,482 03
				140,075 83
March	31.		Balance new account	34,372 86

Continued. 65

& BRADNER. *Cr.*

1875.				
February	13.	5	Cash per draft	5,000 00
	15.	182	Note due Aug. 2	30,000 00
	18.	5	Cash per draft	5,000 00
March	1.	7	do. do. do.	5,000 00
	2.	7	do. do. do.	5,000 00
	8.	8	do. do. do.	5,000 00
	8.	8	do. do. do.	5,000 00
	8.	185	Notes due June 4	4,325 50
	8.	185	do. do. do. 12	4,326 25
	8.	185	do. do. do. 18	4,327 13
	8.	185	do. do. do. 23	4,327 15
	19.	9	Cash per draft	5,000 00
	19.	9	do. do. do.	5,000 00
	23.	9	do. do. do.	5,000 00
	26.	9	do. do. do.	2,500 00
	31.	189	Sales 261, due March 29	10,896 94
	31.	189	Balance to new account	34,372 86

140,075 83

66 EXHIBIT A—

Dr. Messrs. LOWREY

1875.				
March	31.	189	Balance as cash brought down	34,372 86
April	2.	11	Cash p'd their note	4,251 33
	8.	11	Cash p'd their hote	4,200 00
	8.	11	Cash p'd exchange on $5,000	5 00
	10.	12	Cash p'd exchange on $5,000	25 00
	12.	12	Cash p'd d'ft	5,000 00
				47,824 19
			Balance to debit brought down	6,223 64
April	14.	203	Accept'ce due June 15th	5,000 00
	20.	13	Cash ex'ge on $5,250	26 25
	21.	13	Cash ex'ge on $5,000	12 50
	23.	13	Cash p'd d'ft	5,250 00
	24.	14	Cash ex'ge on $5,000	25 00
	26.	14	Cash p'd d'ft	5,000 00
	29.	14	Ex'ge on $5,000	25 00
May	3.	15	Ex'ge on $5,000	12 50
	3.	15	P'd d'ft	5,000 00
	11.	16	Ex'ge on $4,678 30	23 39
	7.	205	Acc'p'ce due June 14	5,000 00
May	7.	207	Acc'pt'ce due July 8	5,000 00
	10.	207	Accept'ce due Aug. 4	4,723 30
	13.	16	Cash p'd d'ft	4,678 30
	17.	17	Cash ex'ge on $6,000	15 00
	19.	17	ex'ge on $5,000	25 00
	20.	17	Cash p'd d'ft	5,850 00
	22.	17	Cash p'd d'ft	5,000 00
	22.	17	Ex'ge on	6 25
	26.	17	Cash p'd d'ft	5,000 00
	26.	210	Acceptance, due July 27	3,000 00
	27.	18	Cash ex'ge on $5,000	17 88
	29.	211	Acceptance, due July 26	5,000 00
June	1.	19	To cash	5,000 00
	2.	19	To cash ex'ge on $4,575	11 43
	10.	213	Our acceptance due June 4	5,000 00
	30.	222	Balance of interest	270 54
				80,195 98
June	30.		Balance to new acc't bro't down	13,301 21

Continued. 67

& BRADNER. *Cr.*

1875.				
March	31.	10	Cash per draft	5,000 00
April	2.	11	do do do	5,000 00
	5.	11	do do do	2,000 00
	8.	11	do do do	5,000 00
	10.	12	do do do	5,000 00
	13.	203	Note due July 16	4,850 00
	13.	203	do do do 17	4,950 25
	13.	203	do do do 19	4,860 30
	13.	203	do do do 23	4,970 00
			Balance to debit acc't	6,223 64
				47,854 19
April	20.	13	Cash per draft	5,250 00
	21.	13	do do do	5,000 00
	24.	14	do do do	5,000 00
	29.	14	do do do	5,000 00
May	3.	15	do do do	5,000 00
	11.	16	do do do	4,678 30
	17.	17	By cash	6,000 00
	19.	17	do	5,000 00
	22.	17	do	5,000 00
	22.	17	do	3,000 00
	27.	18	do	5,000 00
	29.	18	do	5,000 00
June	2.	19	do	4,575 00
	17.	215	Sales 287, due June 20	3,391 47
	30.	222	Balance to new acc't	13,301 21
				80,195 98

68 Supreme Court.

AMARIAH H. BRADNER and DANIEL LOWREY
vs.
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND.

The said plaintiffs, Amariah H. Bradner and Daniel Lowrey, replying to the answer of the defendants herein, as to the counterclaim therein contained, deny each and every allegation of the said defendants' answer therein contained respecting the said counterclaim.

WOOD & SCOTT,
Plaintiffs' Attorneys, Geneseo, N. Y.

STATE OF NEW YORK, }
County of Monroe, } *ss:*

Amariah H. Bradner and Daniel Lowrey, being duly sworn, depose and say, and each for himself deposes and says, that he is a plaintiff in the above-entitled action named; that the foregoing reply is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

A. H. BRADNER.
DANIEL LOWREY.

Severally subscribed and sworn to before me, this 25th day of July, 1878.

JOSEPH S. HUNN,
Commissioner of Deeds.

69 At a circuit court held at the court-house in Geneseo, in and for the county of Livingston, on the 6th day of February, 1880:

Present: Hon. Charles C. Dwight, justice.

AMARIAH H. BRADNER and another
vs.
PETER O. STRANG and others.

This cause having been reached on a regular call of the calendar, on motion of James Wood, of attorneys for the plaintiffs, ordered that the same proceed to trial, whereupon the following jurors were called to try the same, they having been previously sworn:

Names of jurors: Edwin Coy, John Artman, James Sullivan, Martin Stoner, Orlando Woodruff, Isaac H. Thomas, James Rees, John E. Hosmer, J. A. Dana, Hiram Kingsley, William Jones, Simon P. Keeler.

Witnesses for plaintiffs: Amariah H. Bradner, William C. Metcalf, Daniel Lowrey.

Witnesses for defendants: John B. Holland, Joseph Holland, Peter O. Strang.

Jury retire under the charge of a sworn constable, and after due

deliberation come into court and say that they find for the plaintiffs in the sum of $17,517.86.

A true extract from the minutes of said court.

L. J. PATTERSON,
Deputy Clerk.

70 At a circuit court held in and for the county of Livingston, at the court-house in Geneseo, in said county, on the 7th day of February, 1880:

Present: Hon. Chas. C. Dwight, justice:

AMARIAH H. BRADNER and another
versus
PETER O. STRANG *et al.*

The jury having found a verdict for the plaintiffs for $17,517.86, the defendants move on their exceptions and on the judge's minutes to set aside the verdict and for a new trial on the exceptions, and on the ground that the verdict is against the evidence, and the court entertains the motion, and after hearing Mr. Forster for the motion, and Mr. Cogswell in opposition, now, on motion of Wood & Scott, plaintiff's attorneys, it is ordered and determined that said motion be and the same hereby is denied, and on motion of Mr. James Wood, it is hereby ordered that the plaintiffs have an extra allowance of costs in this action in the sum of $250.

(Signed) CHARLES C. DWIGHT, *Justice.*

71 Supreme Court.

AMARIAH H. BRADNER and DANIEL LOWREY
versus
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND.

This action having been tried by the court and a jury, at a circuit court held at the court-house, in Geneseo, in and for the county of Livingston, on the seventh day February, 1880, before the Hon. Charles C. Dwight, and a jury having rendered a verdict for said plaintiffs and against said defendants therein, for the sum of seventeen thousand five hundred and seventeen dollars and eighty-six cents, and said verdict having been entered in the minutes of the said court, now, on motion of Wood & Scott, attorneys for said plaintiffs, it is adjudged by the court that said plaintiffs recover of the said defendants the said sum of seven- thousand five hundred and seventeen dollars and eighty-six cents, together with four hundred and twenty-two and $\frac{73}{100}$ dollars, for their costs and disbursements, and thirty-three and $\frac{69}{100}$ dollars, interest on said verdict since its rendition, amounting in the whole to the sum of seventeen thousand nine hundred and seventy-four $\frac{28}{100}$ dollars.

Judgment signed this 19th February, 1880, 1 p. m.

L. J. PATTERSON, *Dep. Clerk.*

(Endorsed:) Supreme Court. Amariah H. Bradner & another *vs.* Peter O. Strang *et al.* Judgment roll. Wood & Scott, pl'ffs' att'ys.

Filed 19th February, 1880, 1 p. m.

A true copy. L. J. PATTERSON, *Dep. Clerk.*

72 STATE OF NEW YORK, *Livingston County:*

CLERK'S OFFICE, GENESEO, N. Y.

I hereby certify that the foregoing is a copy of the judgment entered in the above-entitled action, in the office of the clerk of Livingston County, N. Y., in book No. 13 of judgments, on page 104, and of the whole thereof.

Dated Geneseo, N. Y., 19 February, 1880.

J. B. PATTERSON, *Clerk.*

Supreme Court.

AMARIAH H. BRADNER and DANIEL LOWREY
versus
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND.

Copy Judgment.

To George H. Forster, defendants' attorney:

Please to take notice that judgment in this action, of which the within is a copy, was entered in favor of said plaintiffs and against said defendants, for seventeen thousand five hundred and fifty-one dollars and fifty-five cents damages, and four hundred and twenty-two dollars and seventy-three cents costs, in Livingston county clerk's office, on the 19th day of February, 1880.

Yours, &c., WOOD & SCOTT,
Def'ts' Att'ys, Geneseo, N. Y.

Rec'd March 5, 1880.

73 Supreme Court.

AMARIAH H. BRADNER and DANIEL LOWREY
against
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND.

Take notice that the defendant, Peter O. Strang, appeals to the general term of the supreme court from the order herein denying the motion to set aside the verdict and for a new trial, entered on the 7th day of February, 1880, and from the judgment entered herein on the 19th day of February, 1880, for the sum of seventeen thousand nine hundred and seventy-four and $\frac{28}{100}$ dollars, and that this appeal is from the whole of said order, and from every part thereof, and from the whole of said judgment, and every part thereof.

Dated New York, March 5th, 1874.

GEORGE H. FORSTER,
Defendants' Attorney, 58 Wall Street, New York City.

To WOOD & SCOTT,
Plaintiffs' Attorneys.
JEROME B. PATTERSON,
Clerk, Geneseo, N, Y.

Served and filed March 6th, 1880.

74 Supreme Court.

AMARIAH H. BRADNER and DANIEL LOWREY
against
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND.

Take notice that the defendants, John B. Holland and Joseph Holland, hereby appeal to the general term of this court from the order entered herein February 7, 1880, denying the motion to set aside the verdict and for a new trial, and from the judgment entered herein on the 19th day of February, 1880, for the sum of seventeen thousand nine hundred seventy-four $\frac{28}{100}$ dollars, and that this appeal is from the whole of said order, and from every part thereof, and from said judgment, and every part thereof.

Dated New York, March 5, 1880.

GEORGE H. FORSTER,
Defendants' Attorney, 58 Wall St., N. Y.

To WOOD & SCOTT, Esq'rs,
Plaintiffs' Attorneys.
JEROME B. PATTERSON,
Clerk, Geneseo.

Served and filed March 6th, 1880.

75 EXHIBIT 1.

NEW YORK, *March 1st*, 1875.

Messrs. LOWREY & BRADNER.

GENTLEMEN: On the 27th ult. we paid our acceptance for your account $5,000, and we to-day draw on you at sight for the same amount, which please protect, and, if necessary, you may draw on us at 60 or 90 days. To-morrow we have another acceptance of your draft to pay for $5,000, and we shall probably draw at sight to protect that. We find the amount of your account, or rather the payments thereon, to be made by you or us this month to be as follows: Our acceptances of your drafts due 2d, $5,000; 8th, $5,000; the 25th, $5,000, and also same date $4,150. Total acceptances, $19,150. Your notes given to us and credited you in account, viz:

Due March	5	$4,000	
" "	8	4,000	
" "	10	4,000	
" "	13	4,000	
" "	24	4,250	
" "	29	4,251	32
Total		$24,501	32

Now some way must be provided to pay these notes, and we most earnestly desire you to pay attention to them. If you will send us on, say, six notes, as per memorandum on the other side, we will do our level best to get them, or as many of them as possible, discounted to cover these above. But you must send them at once by return

mail, as there is not a moment's time to lose. Let us hear from you at once. T'pl us on receipt of this if you will send the notes, as we may find a place to put some of them in the mean time.

Yours, truly, STRANG & HOLLAND BROS.

February	1,	4	mos.,	due	June 4	$4,325 50
"	9,	4	"	"	" 12	4,326 25
"	15,	4	"	"	" 18	4,327 13
"	20,	4	"	"	" 23	4,327 15
"	23,	4	"	"	" 26	4,326 25
"	26,	4	"	"	" 29	4,325 50

Draw these all to your own order and endorse them. Also make them payable at our office, 142 Duane street.

76 EXHIBIT 2.

NEW YORK, *March* 27, 1875.

DEAR DANIEL: Yours of 25th received. The way Mr. Bradner figures it is very original, but not quite correct.

We have transferred a credit of $30,000 to L. and B.'s account and charged the same to A. H. B.'s account. As to discounts, we have only received from you $10,000, and from Bradner, yesterday, $2,500, and in the mean time we have accepted for you and he over $20,000. The rec'd wool has all been credited in account long since, except the two last shipments, value about $4,500. The notes we have received are all good, only we can't get money on them alone, and in the mean time we have paid about $30,000 of your notes, which these last were given to renew in part. Hence, the statement, if corrected, would be about as follows:

Cr.

By A. H. Bradner	$30,000
" discount	12,500
" wool not realized on	4,500
	$47,000

Dr.

To paid notes	$30,000
" accepted d'fts	20,000
	$50,000

And we have $16,000 worth of notes not used. The actual balance of the account is about $40,000, to which is to be added your notes for $16,000. If you pay the notes, then the balance will be $40,000. Our book-keeper has just returned, and he will get your account ready and send it to you on Monday. You have notes coming due early in April, and if you intend to pay them you had better arrange to do it. If you don't intend to pay them they will go to protest. You have a note due Monday, and if you want us to pay it you had

better t'pl us at once on receiving this to do so, and draw to you for the money.

P. O. STRANG.

EXHIBIT 3.

NEW YORK, *April 2d*, 1875.

77 DEAR DANIEL: Yours of the 31st ult. received this morning. I presume you will do all you can, but when you don't do but precious little you must expect to be spurred up.

A. H. B. sent us a draft on us for about same amount, due to-day. Your note due to-day we have paid, although you did not remit us to cover it. Now, Daniel, I expect you to protect our draft drawn on you this last time without drawing on us at sight.

Your notes which have recently run off I might get renewed if you would send me, say, 4 notes having about three months to run, and payable at the Metropolitan National Bank, N. Y. I might use them. Have them for about $4,000 each, but let the amounts be odd. In the last letter I wrote you I reported what Snyder had received from Rochester in relation to those bonds. I feared this when I wrote you asking you to get some one to write to me about them.

Snyder's information comes through his lawyer, and when he gets it it is from our friend Erickson.

I enclose you in this a copy of the joint account between S. & S. and Lowrey & Bristol. This is the only contract, and the one all the business of the joint account was done under.

I dare not offer the notes we have of yours where the last run off were used, because the place where these are payable is at our office, and it would put them on inquiry at once.

Yours, truly, P. O. STRANG.

EXHIBIT B.

MARCH 31, 1875.

Messrs. LOWREY & BRADNER.

GENTLEMEN: Enclosed you will find account sales and account to date. By this you will see that you owe us as cash this day, after crediting all of the wool (except 2 bales No. 2 and 3 bales No. 1), $34,372.86, and this leaves you your notes to pay.

We trust you will find this correct; and, if not, let us know at once, so that we can correct our books if there is any error.

Yours, truly, STRANG & HOLLAND BROS.

78 Dr. Messrs. LOWREY & BRANDER in ac-

1873.		Interest to— Time.	Dr.	
April 1.	To transfer with Strang & Holland as cash	7	$1,920 54	$4,765 44
April 4.	To cash p'd ex'ge on 2,124.86	6.28	20	53
7.	To cash p'd d'ft	6.25	84 63	212 34
11.	" " p'd your note	6.21	200 22	512 34
24.	" note June 7th	4.25	84 58	3,000 00
24.	" " 24th	4.8	124 44	5,000 00
May 9.	" accep'ce due July 10th	3.22	54 44	2,500 00
21.	" " " 21st	3.11	98 19	5,000 00
16.	" mdse. as cash, Jan'y 28th	9.4	370 28	6,949 88
June 13.	" acc'p'ce due Aug. 14th	4.18	37 92	2,500 00
26.	" " " 27th	10	31 68	2,500 00
	" mdse. as cash, Jan'y 28th	9.4	470 68	8,890 84
July 10.	" note due Sept. 9th	1.28	------	5,000 00
15.	" acc'p'ce due Sept. 9th	1.23	------	4,000 00
Aug. 19.	" " " Oct. 19th		------	2,000 00
Sept. 10.	" " " Nov. 10th		------	3,000 00
20.	" " " " 20th		------	2,000 00
Oct. 4.	" " " Dec. 4th		------	2,000 00
20.	" " " Nov. 19th		------	2,000 00
Nov. 10.	" " " Jan. 9th		------	2,000 00
12.	" interest to 1st inst.		------	3,054 90
			$3,575 42	$65,682 08
1873. Nov. 12.	To balance acc. as cash, 1st inst.		------	$15,921 68

New York, Nov. 12th, 1873.

STRANG & HOLLAND BROS.,
Per J. E. LARNED.

count with STRANG & HOLLAND BROS. Cr. 79

1873.		Time.		
April 4.	By cash per d'ft		------	$2,124 86
24.	" note due July 10th		------	2,160 61
24.	" " "		------	5,213 12
May 16.	" cash per d'ft		------	2,129 13
June 24.	" " "		------	2,625 53
Aug. 25.	" note due Nov. 28th	27	$22 83	4,350 00
25.	" " " 29th	28	20 41	3,750 00
25.	" " " 30th	29	20 58	2,650 00
25.	" " Dec. 1st	30	24 79	4,250 00
25.	" " " 3d	32	24 58	3,950 00
Nov. 6.	" " Feb. 4th	3.3	81 37	4,500 00
6.	" " " 9th	3.8	72 41	3,800 00
6.	" " " 14th	3.13	74 10	3,700 00
6.	" " " 19th	3.18	94 50	4,500 00
6.	" " " 24th	3.23	98 87	4,500 00
12.	" sales Aug. 2d		------	21,384 53
12.	" " " 23d		------	17,039 22
12.	" " Oct. 18th		------	6,133 60
12.	" balance to new acc't		------	15,921 68
			$534 44	$65,682 08

80 Dr. Messrs. Lowrey & Bradner, in ac-

1874.		Dr.	Cr.		
M'ch 31.	To bal. acc't as cash	8.8	1,322 30	------	26,366 30
April 8.	Our acp'ce due Jan. 9, '74	5.9	154 58	------	5,000
9.	Cash p'd their note	8.9	242 08	------	5,000
12.	" " "	8.6	236 77	------	4,950
15.	" " "	8.3	234 83	------	4,970
May 12.	Our ac. due July 11	5.7	152 64	------	5,000
June 24.	Cash p'd their note	5.24	133 64	------	3,950
27.	" "	5.21	132 16	------	3,975
"	" "	5.21	134 66	------	4,050
29.	" "	5.19	131 44	------	4,000
July 6.	" "	5.12	121 27	------	3,850
7.	" "	5.11	129 91	------	4,150
8.	" "	5.10	122 88	------	3,950
Aug. 4.	" "	4.14	130 28	------	5,000
7.	" "	4.11	101 89	------	4,000
11.	" "	4.7	108 04	------	4,375
13.	" "	4.5	105 12	------	4,325
13.	Our acp'e due Oct. 9	2.9	67 08	------	5,000
17.	" " 16	2.2	60 28	------	5,000
20.	" " 21	1.27	55 42	------	5,000
17.	Cash p'd their note	4.1	100 70	------	4,280
19.	" "	3.29	69 88	------	3,020
Sept. 3.	Our acp. due Nov. 4	4.1	25 67	------	3,000
11.	" "	1.6	10 50	------	1,500
22.	" "	2.7	15 75	------	3,000
23.	Cash p'd their note	2.25	65 29	------	3,950
26.	" "	2.22	64 58	------	4,050
28.	" "	2.20	61 84	------	3,975
28.	Our ac. due Nov. 26	22	17 11	------	4,000
Oct. 1.	Cash p'd their draft	2.17	59 89	------	4,000
2.	" " note	2.16	59 11	------	4,000
2.	Our acp. due Dec. 28	10	------	6 81	3,500
7.	" " 7	11	1 07	------	500
16.	" " 17	1	97	------	5,000
13.	Cash p'd their note	2.5	48 66	------	3,850
16.	" "	2.2	50 03	------	4,150
19.	" "	1.29	45 31	------	3,950
19.	Our acc'p'ce due Jan. 16, '75	29	------	24 53	4,350
22.	" Dec. 23, '74	5	------	4 86	5,000
30.	" Dec. 30, '74	12	------	11 67	5,000
Nov. 7.	Cash p'd their draft	1.11	39 86	------	5,000
10.	" " note	1.9	29 56	------	4,000
10.	Our acc'p'ce due Jan. 9, '75	22	------	21 39	5,000
13.	" Dec. 30, '76	12	------	9 33	4,000
	Carried to sheet No. 2	4,643 45		78 79	203,986 30

count with STRANG & HOLLAND BROTHERS. Cr. 81

1874.			Dr.	Cr.	
April 23.	By note due Aug. 4, 1874, Int. to Dec. 18, '74	4.14	130 28	------	5,000
	Note due Aug. 7, '74	4.11	101 89	------	4,000
	" " " 11, "	4.7	108 04	------	4,215
	" " " 13, "	4.5	105 52	------	4,325
	" " " 17, "	4.1	100 70	------	4,280
	" " " 19, "	3.29	69 88	------	3,020
6.	Cash	8.12	245 11	------	5,000
May 11.	Cash	7.7	210 97	------	5,000
June 8.	Note due Sept. 23, "	2.25	65 29	------	3,950
	" " 26, "	2.22	64 58	------	4,050
	" " 28, "	2.20	61 84	------	3,975
	" Oct. 2, "	2.16	59 11	------	4,000
26.	" " 13, "	2.5	48 66	------	3,850
	" " 16, "	2.2	50 03	------	4,150
	" " 19, "	1.29	45 31	------	3,950
29.	" Nov. 5, "	1.13	41 81	------	5,000
	" " 10, "	1.8	29 56	------	4,000
	" " 14, "	1.4	28 92	------	4,375
	" " 16, "	1.2	26 91	------	4,325
	" " 20, " 28		23 30	------	4,280
	" " 24, " 25		14 68	------	3,020
Aug. 10.	Cash	4.8	124 44	------	5,000
15.	"	4.3	119 58	------	5,000
20.	"	3.28	80 31	------	3,500
Sept. 1.	"	3.17	52 01	------	2,500
15.	Note due Dec. 24, '74 6		------	4 73	4,050
	" " 28, " 10		------	7 72	3,975
	" " 31, " 13		------	9 92	3,950
24.	Cash	2.25	66 11	------	4,000
26.	"	2.22	63 78	------	4,000
Oct. 8.	Note due Jan. 5, '75 18		------	14 17	4,050
	" " 15, " 28		------	21 50	3,950
	" " 19, " 1.1		------	28 01	4,150
	" " 23, " 1.5		------	26 20	3,850
13.	Cash	2.5	50 56	------	4,000
22.	"	1.26	54 44	------	5,000
27.	"	1.21	49 58	------	5,000
Nov. 4.	"	1.14	42 78	------	5,000
7.	"	1.6	31 89	------	4,000
12.	"	1.6	28 00	------	4,000
12.	"	1.6	10 50	------	1,500
14.	Note due Sep. 15, '74	3.3	79 75	------	4,409 85
20.	Cash	29	21 76	------	4,000
20.	"	21	7 43	------	1,565 04
	Carried to sheet No. 2		2,514 82	109 32	178,174 89

82 No. 2.

To amount brought forward sheet No. 1 -- $203,986 30

1874.			Dr.	Cr.	
			4,643 45	78 59	
Nov. 12.	To cash p'd ex'ge on d'fts to take up their notes, viz.:				
	M'ch 25, '74, on $6,000	15 00			
	Ap'l 6, 5,000	18 75			
	Sept. 1, 2,500	6 25			
	23, 4,000	17 78			
	26, 4,000	17 78			
	Oct. 13, 4,000	17 78			
	22, 5,000	22 22			
	27, 5,000	10 97			
	Nov. 4, 5,000	22 22			
	" 7, 4,000	17 78			
	Average paid Aug. 27, '74---- 3.21		3 61	------	3,166 53
12.	To cash ex'ge on $4000 1.6		13	------	17 78
16.	cash p'd their note 1.2		26 91	------	4,325
19.	cash paid protest- 29		2	------	3 79
20.	cash ex'ge on $4,000 ---- --- 28		10	------	17 78
20.	cash p'd their note 28		6 68	------	1,227
20.	cash p'd their note 28		23 30	------	4,280
21.	our acc'p'ce due Feb. 11---- 1.24		------	41 58	3,960
21.	our acc'p'ce due Feb. 18------- 2.0		------	51 68	4,430
30.	cash paid their note Nov. 5---- 1.13		41 81	------	5,000
30.	cash paid their note Nov. 13--- 1.5		29 77	------	4,375
30.	cash paid their note Nov. 24--- 25		14 68	------	3,020
Dec. 3.	cash paid d'ft---- 15		11 67	------	4,000
3.	our acc'p'ce due Jan. 18, '75---- 30		------	17 50	3,000
18.	our acc'p'ce due Feb. 18, '75---- 2.0		------	58 33	5,000
18.	balance interest- ---		------	------	2,358 76
			$4,892 13	247 68	249,167 94

Dec. 18. To balance as cash -- $39,993 05
E. E.

New York, Dec. 18th, '74.

STRANG & HOLLAND BROTHERS,
Per J. E. LARNED.

83	1874. By am't brought forward from sheet No. 1					178,174 89
				Cr.	Dr.	
				2,514 82	------	----------
Nov.	30. By cash		18	22 75	------	6,500
	30. "		18	12 25	------	3,500
Dec.	7. Note due M'ch 5, '75		2.15	------	58 33	4,000
	" " 8, "		2.18	------	60 67	4,000
	" " 10, "		2.20	------	62 32	4,000
	" " 13, "		2.23	------	64 56	4,000
	17. Cash			97	------	5,000
	18. Balance to new acc.			------	------	39,993 05
				2,550 79	355 10	

Dr.	Interest		$4,802 13
"	" on Cr. side		355 10
			$5,157 23
Cr.	Interest	$2,550 79	
"	"		
	on Dr. side	247 68	
			2,798 47
	Balance ch'g'd in acc.		$2,358 76

$249,167 94

84 Dr. Messrs. LOWREY & BRADNER, in ac-

1874.			Dr.	Cr.	
Dec. 18.	To balance acc. as cash this day	1.12	326 62	------	39,993 05
18.	By cash, cigars	1.12	14	------	17
24.	Do. paid their note	1.6	28 35	------	4,050
24.	Acc. due M'ch 25,'74	1.25	------	44 38	4,150
26.	Cash p'd ex. on 5000	1.4	08	------	12 50
28.	Acc. due Feb. 27, '75	28	------	27 22	5,000
28.	Cash paid their note	1.2	24 74	------	3,975
29.	Cash do. ex. on 5000	1.1	08	------	13 33
30.	Acc. due M'ch 2d,'75	1.2	------	31 11	5,000
31.	do. Feb. 17, '75	18	------	14 00	4,000
31.	do. April 3, '75	2.04	------	62 04	4,985
31.	Cash paid their note	1.	23 04	------	3,950
1875.					
Jan. 2.	do. ex. on 5000	28	07	------	12 50
5.	do. their note	25	19 68	------	4,050
5.	do. ex. on 5000	25	06	------	12 50
5.	Acc. due M'ch 8, '75	1.8	------	36 94	5,000
8.	do. Jan. 14, '75	16	15 56	------	5,000
8.	do. April 5, '75	2.6	------	49 54	3,860
9.	Cash p'd ex. on 5000	21	09	------	22 22
12.	do. their d'ft	18	17 50	------	5,000
12.	do. ex. on 5000	18	04	------	11 11
15.	do. their note	15	11 51	------	3,950
15.	do. their d'ft	15	7 29	------	2,500
19.	do. ex. on 5000	11	05	------	22 22
22.	Acc. due M'ch 25, '75	1.25	------	53 47	5,000
25.	Cash p'd ex. on 3000	5	01	------	15
28.	do. their draft	2	1 17	------	3,000
30.	do. ex. on 5000		------	------	25
30.	Their note due Jan. 19, not paid	11	8 88	------	4,150
30.	do. do. 23d	7	5 24	------	3,850
30.	Bal. fl'e w'l acc. as cash		------	------	7,477 19
30.	Interest		------	------	172 78
			490 20	318 70	128,277 40

1875.
Jan. 30. To balance acc. as cash ---------- $53,709 67

E. E.

New York, January 30th, 1875.

STRANG & HOLLAND BROS.,
Per J. E. LARNED.

count with STRANG & HOLLAND BROTHERS. Cr. 85

1874. Interest to January 30, 1875.	Dr.	Cr.	
Dec. 26. By cash p'r d'ft on them	1.1	33 06	5,000
29. By cash pr. d'ft on them	1.1	30 14	5,000
29. By cash pr. d'ft on them	1.1	18 08	3,000
29. By cash paid P. O. Strang Aug. 20th	5.20	1 65	50
31. Sale due Jan. 18th, '75	12	12 98	5,564 08
1875.			
Jan. 1. Cash pr. d'ft on them	29.	28 19	5,000
4. Note due M'ch 24th, '75	1.24	44 62	4,250
4. Note due M'ch 29th, '75	1.29	48 76	4,251 32
4. Note due April 2d, '75	2.3	52 07	4,251 33
4. Note due April 8th, '75	2.9	56 35	4,200
5. Cash pr. d'ft on them	25	24 31	5,000
9. do. do.	21	20 42	5,000
12. do. do.	18	8 75	2,500
18. do. do.	12	9 33	4,000
19. do. do.	11	10 69	5,000
25. do. do.	5	2 92	3,000
30. do. do.			5,000
30. Allce. on B. A. sheep skins as cash			4,500
30. Bal. to new acc. as cash			53,709 67

(Red) Interest, Dr.,	$490 20		
" do.	201 80		
		$692 00	
(Blue) Interest, Cr.,	318 70		
" do.	200 52		
		519 22	
Balance		$172 78	

201 80	200 52	128,276 40

86 EXHIBIT C.

Dr. Messrs. LOWREY & BRADNER, in account

1875.			Dr.	Cr.	
Jan. 30.	To balance as cash	2.1	637 06		$53,709 67
Feb. 3.	Cash paid drafts	1.28	56 39		5,000
13.	" ex. on 5,000	1.18	23		25
17.	" draft "	1.14	42 78		5,000
18.	" exg'e "	1.13	21		25
March 1.	" " "	30	14		25
2.	" " "	29	14		25
5.	" draft "	26	25 28		5,000
"	" "	26	25 28		5,000
8.	" their note	23	17 89		4,000
"	" ex. on 5,000	23	11		25
"	" " "	23	3		6 25
11.	" drafts	20	38 89		10,000
"	Our ac'pe due May 8	1.8		34 57	4,678 30
19.	Cash p'd ex. on 10,000	12	7		30
23.	" draft	8	7 78		5,000
"	" ex. on 5,000	8	4		25
"	Our ac'pe due Ap'l 24	24		25 67	5,500
"	" May 24	1.24		57 75	5,500
24.	Cash paid their note	7	5 79		4,250
26.	" " draft	5	4 86		5,000
29.	" " note	2	1 67		4,251 32
30.	Their note due M'ch 5	26	20 22		4,000
"	" M'ch 10	21	16 33		4,000
"	" M'ch 13	18	14		4,000
"	Our ac'pe due May 25	1.25		48 32	4,518 26
31.	Interest				1,482 03
			915 19	166 31	140,075 82
M'ch 31.	To balance as cash				34,372 86

E. E.
New York, March 31, 1875.

STRANG & HOLLAND BROS.,
Per J. E. LARNED.

with STRANG & HOLLAND BROS., Cr. 87

1875.		Interest to March 31, 1875.	Dr.	Cr.	
Feb.	13.	By c'h p. d'ft on them 1.18	------	46 67	5,000
	15.	note due Aug. 2,'75 4.2	711 66	------	30,000
	18.	c'h p. d'ft on them 1.13	------	41 81	5,000
M'ch	1.	" " 30	------	29 17	5,000
	2.	" " 29	------	28 19	5,000
	8.	" " 23	------	22 36	5,000
	8.	" " 23	------	22 36	4,325 50
	8.	their note due J'e 4 2.4	53 82	------	5,000
	8.	" " "12 2.12	60 56	------	4,326 25
	8.	" " "18 2.10	65 63	------	4,327 13
	8.	" " "23 2.23	69 83	------	4,327 15
	19.	c'h p. d'ft on them 12	------	11 67	5,000
	19.	" " 12	------	11 67	5,000
	23.	" " 8	------	7 78	5,000
	26.	" " 5	------	2 43	2,500
	31.	sale No. 261, due March 29, '75--- 2	------	4 24	10,896 94
		Balance to new account ----------			34,372 86
			961 50	228 35	140,075 82

DR.	Interest ----------		915 19
"	" ----------		961 50
			$1,876 69
CR.	Interest-----	166 31	
"	" -----	228 35	
			394 66
	Balance----------		1,482 03

(In pencil,) Dr.

April 1. Cash p'd A. H. B-- 5,000
3. do. do. -- 2,000

88 DR. Messrs. LOWREY & BRADNER, in ac-

1875.		Interest to June 30, 1875.	Dr.	Cr.	
Mar.	31.	To bal. as cash ----- 3.	$601 53		$34,372 86
Apr.	2.	c'h pd. their note- 2.28	72 74	------	4,251 33
	3.	our acc. due J'e 4 26	25 28	------	5,000
	8.	c'h pd. their note- 2.22	66 97	------	4,200
	8.	do. ex. on $5,000 2.22	08	------	5
	10.	do. do. do. 2.20	39	------	25
	12.	do. their d'ft--- 2.18	75 83	------	5,000
	14.	our acc. due J'e 15 15	14 58	------	5,000
	20.	c'h p. ex. on $5,250 2.10	35	------	26 25
	21.	do. do. $5,000 2.9	16	------	12 50
	23.	do. their d'ft--- 2.7	68 39	------	5,250
	24.	do. ex. on $5,000 2.6	32	------	25
	26.	do. their d'ft--- 2.4	62 22	------	5,000
	29.	do. ex. on $5,000 2.1	30	------	25
May	3.	do. do. do. 1.27	14	------	12 50
	3.	do. their d'ft--- 1.27	55 42	------	5,000
	7.	our acc. due J'e 14 16	15 57	------	5,000
	7.	do. do. July 8 8	------	7 78	5,000
	10.	do. do. Aug. 4 1.4	------	31 22	4,723 30
	11.	c'h pd. on exge on 4,678.30 -- 1.19	22	------	23 39
	13.	c'h pd. their d'ft- 1.17	42 75	------	4,678 30
	17.	do. ex. on 6,000 1.13	12	------	15
	19.	do. do. 5,000 1.11	20	------	25
	20.	do their d'ft--- 1.10	45 50	------	5,850
	22.	do. do --- 1.8	36 94	------	5,000
	22.	do. exge ------ 1.8	04	------	6 25
	26.	do. their d'ft--- 1.4	33 06	------	5,000
	26.	our ac. due July 27 2.7	------	15 75	3,000
	27.	c'h p. ex. on 5,000 1.3	11	------	17 88
	29.	our ac. due July 28 26	------	28 28	5,000
June	1.	cash---------- 29	28 19	------	5,000
	2.	do. pr. ex. on 4575 28	06	------	11 43
	30.	Interest----------	----------	----------	270 54
		Bal. int. dr. side----------	1,167 43		
			$1,247 46	1,247 46	121,826 53
June 30, 1875. To balance as cash----------					13,301 21

E. E.

New York, June 30th, 1875.

STRANG & HOLLAND BROS.,
Per J. E. LARNED.

count with STRANG & HOLLAND BROS. Cr. 89

1875.				Dr.	Cr.	
Mar.	31.	By cash per d'ft	3.0	------	87 50	5,000
Apr.	2.	do do	2.28	------	85 56	5,000
	5.	do do	2.25	------	33 06	2,000
	8.	do do	2.22	------	79 72	5,000
	10.	do do	2.29	------	77 78	5,000
	20.	do do	2.10	------	71 46	5,250
	21.	do do	2.9	------	67 08	5,000
	24.	do do	2.6	------	64 17	5,000
	29.	do do	2.1	------	59 31	5,000
May	3.	do do	1.27	------	55 42	5,000
	11.	do do	1.19	------	44 57	4,678 30
	11.	By their note due July 16	16	15 08	------	4,850
	11.	By their note due July 17	17	16 36	------	4,950 25
	11.	By their note due July 19	19	17 95	------	4,860 30
	11.	By their note due July 23	23	22 22	------	4,979
	17.	By cash per d'ft	1.13	------	50 17	6,000
	29.	do	1.11	------	39 86	5,000
	22.	do	1.8	------	36 94	5,000
	22.	do	1.8	------	22 07	3,000
	27.	do	1.3	------	32 08	5,000
	29.	do	1.1	------	30 14	5,000
June	2.	do	28	24 91	------	4,575
	17.	By sale wool due June 20, '75	10	------	6 60	3,391 47
	30.	Balance to new acc		------	------	13,301 21
		Balance int. cr. side		896 89		
				968 50	968 50	121,826 53

90 EXHIBIT F.

DANSVILLE, *Dec.* 31, 1874.

Messrs. STRANG & HOLLAND.

GENT'N: We have drawn on you this day to order of L. Grant, cash at ninety days, for $4,985.00, which please accept, and oblige

Yours, LOWREY & BRADNER.

EXHIBIT G.

23 NORTH WALL STREET, ROCHESTER, N. Y., *Dec.* 26, 1874.

STRANG & HOLLAND BROS.

GENTLEMEN: Have drawn for $500 and telegraphed you to draw on us for same amount.

LOWREY & BRADNER.

EXHIBIT H.

23 NORTH WATER STREET, ROCHESTER, N. Y.
January 4th, 1875.

STRANG & HOLLAND BROS.

Have drawn on you for $5,000, 60 days; will pay your d'ft $5,000. Bradner will send you $5,000. Don't draw.

LOWREY & BRADNER.

91 EXHIBIT K.

23 NORTH WATER STREET, ROCHESTER, N. Y., *Dec* 2, 1874.

Messrs. STRANG & HOLLAND BROS.

GENTLEMEN: We drew on you to-day at sight for $4,000, and took in your 2.

Will send you sample of our extra; don't draw on us, for it plays the d—l with us at our bank; we will try and send you funds when you may want.

Yours, truly, LOWREY & BRADNER.

EXHIBIT L.

23 NORTH WATER STREET, ROCHESTER, N. Y., *Dec.* 31, 1874.

STRANG & HOLLAND:

We have drawn on you to-day for $4,000, 45 days, and will provide you two.

29th, $5,000, 60 days.
30th, 4,000, 45 days.

$9,000

Yours, truly, D. LOWREY.

EXHIBIT M.

DANSVILLE, *Dec.* 22, 1874.

MESSRS. STRANG & HOLLAND.

92 GENT'N: We have drawn on you to-day to order of L. Grant cash for $4,150, at three mos., which please accept, and oblige,

Yours, truly, LOWREY & BRADNER.

EXHIBIT N.

23 NORTH WATER STREET,
ROCHESTER, N. Y., *January 13th*, 1875.

P. O. STRANG, Esq.

DEAR SIR: Your telegram, saying you had drawn on us for $2,500, has been received. I have been to my banker this morning, but can get no more discounts this week; our line is full. I have telegraphed Bradner to come down in the morning, and we will do all we can. If you can get along until next week I will try and send you some.

Yours, truly, D. LOWREY.

EXHIBIT P.

1169.

THE WESTERN UNION TELEGRAPH COMPANY.

Dated Rochester, N. Y., 28.

Rec'd at 145 Broadway, Dec. 28, 1874.

To Strang & Holland Bros., 142 Duane St., N. Y.

Drawn on us Wednesday for four thousand.

LOWREY & BRADNER.

93 EXHIBIT Q.

23 NORTH WATER ST., ROCHESTER, N. Y., —— 15, 1874.

DEAR PETER: Send me those segars and you may draw the 17th for $5,000. See that your draft don't come through the city bank for collection.

I came to the office to-day feeling a little blue—shaky.

Yours, D. LOWREY.

EXHIBIT R.

23 NORTH WATER ST., ROCHESTER, N. Y., *Dec.* 16, 1874.

DEAR PETER: Your letter came to the house and found me feeling a little better. It is not dyspepsia that is the matter of me. It is just the opposite. I see you don't realise what it cost me to get money; every $5,000 cost me $9.14; for 2 months, $30,000, $534.84. So you say, J—— L——, not so much as you think. If you can get along by drawing in the money for $4,000, do so; I cannot get out to make collections and am short. I think the shorts is the

matter with me. If you can make that fleece wool net us 50c., you had better sell; don't sell if you can't do that; find fleeces will bring 50c. cash here, not as good as the wool you have. Bradner is down there, and I hope he will go for you.

Yr., t'y, D. LOWREY.

A man from Bath just been to see me. He has 60,000 fine fleeces; just offer 50c. cash for it, but will not sell.

D. L.

94 EXHIBIT S.

53 NORTH WATER STREET, ROCHESTER, N. Y., *Dec.* 24, 1874.

STRANG & HOLLAND BROS.

GENTS.: Your telegram finds me still under the Dr 's care, and no better. I have been trying to get you some funds, but our banker cannot do anything for us before the 1st of the month. If I should be able to get out Saturday, may be able to do something; if so, you can draw on us for $5,000. I will telegraph you Saturday, if I can do anything.

Yours, truly, D. LOWREY.

EXHIBIT T.

23 NORTH WATER STREET, ROCHESTER, N. Y., —— 28*th*, 1872.

STRANG & HOLLAND BROS.

GENTLEMEN: Why don't you see that your d'ft do not come through the city bank for collection? Your dr'ft came through the city bank to-day and plaid the d——l with us.

You can draw on Wednesday for $4,000. I have 2 doctors tending me now, and if I don't get better will send for another.

D. LOWREY.

95 EXHIBIT U.

ROCHESTER, *Feb.* 5, 1877.

P. O. STRANG, Esq.

DEAR SIR: There is a fine residence on the avenue that can be had for a cheap rent, and in a year or so can be bought at a bargain, and you had better dispose of your place and come up here and settle. You can live cheaper here than where you now are, and your chances for doing business much better. This place is one of our best on the avenue, with 2 acres of lawn about it, and plenty of fruit. It belongs to a particular friend of mine, and I can get it cheap—say $1,000 a year rent, with the privilege of buying it. You can't do better anywhere, and it is worthy of your consideration.

I sent you bbl. cider; did it come to you in good order?

Yours, truly, D. LOWREY.

EXHIBIT V.

DANSVILLE, *Sept.* 20, 1877.

P. O. STRANG, Esq.

DEAR SIR: I returned this morn. I, of course, see no necessity to repeat what I said to you, but I trust you can appreciate what I

did say, and I hope will assist me in the present condition of my affairs.

If we can get into business again we will probably make it mutually beneficial; at least I hope so. Our factory is in fine order, and we can soon have it running. We don't expect to do any large business, but to do it in a small and economical way, and do it well. We think it can be done.

Yours, truly, A. H. BRADNER.

96 EXHIBIT W.

DANSVILLE, *Feb.* 7, 1877.

P. O. STRANG, Esq.

DEAR SIR: D. writes me he has sent you an offer of an establishment in that city that is well worth considering. If you have had such an idea, would suggest that you come up and bring your wife with you and look over the ground.

As regards the inducements of living there, you are pretty well acquainted with them. I have no doubt he has a pleasant place, well located, &c., and as these are not very busy days, why not give it a look? The change might be advantageous in a variety of ways, and among which the one of climate may not be the least, and many others that might be mentioned.

Truly, yours, A. H. BRADNER.

EXHIBIT Z.

DANSVILLE, *July* 11, 1876.

DEAR PETER: A combination of unfortunate circumstances impells me to appear to you at this time to ask a favor. Of course it is by no ordinary pressure, and one unlooked for till the present hour that has driven me to it, or I should not wish to intrude my necessities upon you at the present. I would like you to procure some one to loan me three thousand dollars on say six months, or longer I would prefer, with security if required; the money I would like deposited to the credit of the Bank of Dansville, at the Metropolitan Bank. If you can do me this favor it will be fully appreciated. If it is done this week would suit my requirements.

97 While writing, I will also add that Dan has just written me that he had a call from Bristol, who said the Roch. N. & Pa. R. R. was going into new contractors' hands (this I see also in the Roch. papers of this morn), with a "new deal" all round, and that he expected to get some bonds to have fully organized; parties in New York and Philadelphia are to take it and finish it, if so B. will I think get something out of it, and if he does my faith is strong that D. will get help from him. Hoping to hear from you at your convenience,

Am y'rs, truly, A. H. BRADNER.

98 Supreme Court.

AMARIAH H. BRADNER and DANIEL LOWREY
vs.
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND.

Interrogatories to be administered to William B. S. Gay, of the city of Boston, a witness to be examined under the annexed commission on behalf of the plaintiff in the above-entitled action:

First. What is your name, age, occupation, and place of residence?

To the first interrogatory he saith: My name is William B. S. Gay, 58 years old, note broker, Boston.

Second. Do you know the parties above named or any of them? If yea, which of them, and how long have you known them or either of them?

To the second interrogatory he saith: I have been introduced to Mr. Bradner; I do not know any other one of them; he was simply brought into my office one day about a year ago, and I was introduced to him; he did not stay beyond ten minutes, and I have never seen him since to my knowledge, and should not know him again.

Third. Look upon the promissory note herewith shown you, dated Rochester, N. Y., February 15th, 1875, for $4,327.13. Have you seen and had in your possession that note before this? If yea, state when you saw and had it, who delivered it to you, and for what purpose; what disposition did you make of it; if you say you sold it, to whom did you sell it, and how much did you receive for the same?

99 To the third interrogatory he saith: I have had a note of the same tenor, date, and amount, same promissors and same endorsers, but I cannot tell whether this is the identical note; I frequently have notes consigned to me for sale where there are one or two duplicates of the same thing; this is why I cannot swear that this note is the identical note once in my possession; I first had that note on the 25th day of March, 1875. It came by mail from O. M. Bogart & Co., my correspondent in New York, for sale. I sold it to John Townsend, of Boston, and I received from him for it ($4,251.42) forty-two hundred and fifty-one dollars and forty-two cents in cash.

(The note annexed to this deposition was shown to the witness previous to his answering the third interrogatory by Henry Parkman, commissioner.)

Fourth. On whose account did you sell said note, and what did you do with the proceeds?

To the fourth interrogatory he saith: I sold it on account of O. M. Bogart & Co.; I paid O. M. Bogart & Co.'s draft on me with the proceeds.

Lastly. Do you know anything concerning the matter in question that may tend to the benefit and advantage of the plaintiff? If yea, declare the same fully and at large, as if you had been particularly interrogated concerning the same?

To the last interrogatory he saith: I know nothing whatever.

Cross-interrogatories:

First. Do you know the Atlas Bank of Boston? If yea, how long have you known such bank, and what connection, if any, have you had therewith?

To the first cross-interrogatory he saith: I have known the Atlas Bank of Boston for ten years; my only connection with them has been in selling them business paper.

100 Second. If you refer to any promissory notes, state whether or not any amounts have been paid on said notes by any person or persons? If yea, state when such payment was made; by whom; what was the amount then paid? Annex copies of the receipts given for each such payment, or the originals, if you have any originals. If you annex copies, state whether or not they are correct copies, and why you do not annex the originals.

To the second interrogatory he saith: I know nothing of the future of any note after it has been sold and delivered by me, neither do I know anything of any payments in the note which has been shown me; I never sold any business paper where partial payment had been made on it before I sold it.

Third. Was the note ever paid or surrendered? Is it still held by the owner of the note, upon completion of the transaction inquired about in the direct interrogatories? If it was ever surrendered, or any payment made thereof or therein, state under what terms or agreement it was so surrendered. Annex such agreement, if in writing, or a copy thereof. State that you have done so. If you do not annex the original, state why you annex a copy instead.

To the third interrogatory he saith: I know nothing about the matters inquired into in the interrogatory.

Fourth. Did you, or did the Atlas Bank, have any correspondence with the defendants, or either of them, or their firm, or their assignees in bankruptcy, about such note after you bought it? If yea, annex such correspondence. State that you have done so.

To the fourth cross-interrogatory he saith: I know nothing of the matter inquired into by the interrogatory.

Fifth. Did the plaintiffs, or either of them, have any correspondence with you or with the Atlas Bank, after the maturity of the note? If yea, annex such correspondence, and state that you have done so.

To the fifth cross-interrogatory he saith: They never had
101 any correspondence with me, and I know nothing of their having had any correspondence with the Atlas Bank.

Lastly. Do you know anything about the matters in controversy herein that may tend to the benefit or advantage of the defendants, or either of them? If yea, declare the same fully and at large, as if particularly interrogated in relation thereto, and state that you have done so.

To the last cross-interrogatory he saith: I know nothing whatever.

Supreme Court.

AMARIAH N. BRADNER and DANIEL LOWREY
vs.
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND.

Interrogatories to be administered to G. F. Davis, of the city of Hartford, State of Connecticut, a witness, to be examined under the annexed commission, on behalf of the plaintiff in the above-entitled action:

First. What is your name, age, occupation, and place of residence?

To the first interrogatory he saith: My name is Gustavus F. Davis; I am 61 years of age; am a broker by occupation, and reside in Hartford, Connecticut; I am president of the City National Bank of that city.

Second. Do you know the parties above named, or any of them? If yea, which of them, and how long have you known each of them?

102 To the second interrogatory he saith: I do not know any of the parties referred to in the interrogatory. One of the firm of Lowrey & Bradner (but I don't know which one it was) came to Hartford on or about the 16th day of April, 1876, and had an interview with me relative to a settlement of the claim of the bank of which I am president against his firm, on the note held by the bank; I also saw the same gentleman in Hartford on another occasion in regard to the same matter; I have no other acquaintance with any of the parties.

Third. Look at the promissory note herewith shown you, dated Rochester, N. Y., Feb. 20, 1875, for $4,327.15. When did you first see that note? Did you purchase that note? If yea, when, of whom, and what did you pay for the same?

To the third interrogatory he saith: On the 23d day of March, 1875, I first saw the note in question; I purchased it on that day of O. M. Bogert & Co., note brokers in New York city, together with 19 other notes, amounting in all to about $40,000, all for the City National Bank of Hartford, Connecticut; the interest on the whole was $806; the whole amount of the interest is entered all in one sum on our books, and the memorandum showing the rate on each particular piece was long ago destroyed, so that I cannot tell what the discount was on this particular piece, but it was, I presume, the current rate of discount at the time of purchase on that class of paper; the paper was considered good and the rate was probably from 7 to 9 per centum.

Fourth. On whose account did you purchase said promissory note, for whom did you act, and who, if any one, became the owner of the note upon completion of the transaction?

To the fourth interrogatory he saith: The said note was purchased for the City National Bank, for which I acted, and which became the owner of the paper on its purchase.

103 Fifth. Was the note paid at maturity? If not, state what you or the bank did to charge the endorsers.

To the fifth interrogatory he saith: The note was not paid at maturity; the bank caused it to be protested for non-payment on the 23rd day of June, 1875, by Robert Owen, a notary public in the city of New York, as stated in the certificate of said notary attached to said note; I suppose the endorsers were notified duly.

Lastly. Do you know anything concerning the matters in question that may tend to the benefit and advantage of the plaintiff? If yes, declare the same fully and at large, as if you had been particularly interrogated concerning the same.

To the sixth and last interrogatory he saith: A payment on said note of fifteen hundred and four ($1,504.68) dollars was made by Lowrey and Bradner on the 16th of April, 1876, on which payment we verbally agreed to discharge them from all obligation on this note. There was another payment made on the 21st of June, 1876, of one hundred and twenty-seven (127.82) dollars, by the assignee in bankruptcy of Strang & Holland Brothers, and another payment by the same assignee of ninety-five (95.68) dollars, on the 26th of November, 1877. I do not think of any other facts relative to the note. I have used the expression, "we verbally agreed," but I presume, although I have no recollection of it, that we gave a receipt to that effect.

Cross-examination:

First. Do you know the City Bank of Hartford? If yea, how long have you known such bank, and what connection, if any, have you had therewith?

I do know the City National Bank of Hartford, and have known it since its organization as a national bank in 1865. I knew it previously as the City Bank of Hartford. I have been president continuously since 1857.

Second. If you refer to any promissory note, state whether
104 or not any amounts have been paid on said notes by any person or persons? If yea, answer when each such payment was made; by whom; what was the amount thereof? Annex copies of receipts given for each of such payment, or the originals, if you have any originals. If you annex copies, state whether or not they are correct, and why you did not annex the origiuals?

I have already stated on the direct examination what amounts have been paid on said note and when and by whom. I have no knowledge of any receipts having ever been given for said payments. For the payment made by Lowrey & Bradner, it is possible that a receipt may have been given, but I have no copy of such receipt, nor any recollection in regard thereto; the amounts paid by the assignee in bankruptcy were paid in checks, payable to the order of the bank or the cashier, so far as I recollect, and we gave no receipts beyond an endorsement on said checks.

Third. Was the note ever paid and surrendered, or is it still held by the owner of the note upon completion of the transaction inquired about in the direct interrogatories. If it was ever paid or surrendered, state under what terms or agreement it was surrendered, annex such agreement or copy thereof, and state that you have done

so, and why you annex a copy of the same instead of the original.

When the said payment was paid by Lowrey & Bradner, the note was retained by the bank for the purpose of collecting any dividend that might be made from the estate of Strang & Holland Bros. After the collection of these dividends, Lowrey & Bradner wrote to us for the note, and I sent it to them. So far as I recollect, there was no agreement to surrender the note, and as I recollect it, we sent it, because they wanted to use it in this suit. I do not know the date of the letter, and, therefore, do not know where to look for it on our files.

Fourth. Did you, or did the bank, ever have any correspondence with the defendants, or either of them, or their firm, of Strang
105 & Holland Bros., or their assignee in bankruptcy, about such note, after February 20, 1875. If yea, annex such correspondence, and state that you have done so.

Neither I, nor so far as I know, the bank, has had any correspondence relating to this note with any of the parties named in this cross-interrogatory.

Fifth. Did the plaintiffs, or either of them, at any time after the maturity of said note, have any correspondence with the owner of the note, or with you or the bank about such note, or any compromise thereof, or payment thereof or thereon? If yea, annex such correspondence, and state that you have done so.

There has been no correspondence with me or with the bank to my knowledge by the plaintiffs, or either of them, other than above stated.

Lastly. Do you know anything concerning the matters in controversy herein that may tend to the benefit or advantage of the defendants, or either of them? If yea, declare the same fully and at large, as if particularly interrogated in relation thereto, and state that you have done so.

I have stated all the facts in my knowledge about the transaction so far as I can recollect.

106 STATE OF NEW YORK:

At a general term of the supreme court, fourth judicial department, held at the court-house in the city of Rochester, Monroe county, on the 31st day of December, 1880.

Present: Hon. John L. Talcott, presiding justice; Hon. Geo. A. Hardin, Hon. David Rumsey, associate justices.

AMARIAH H. BRADNER and others, Respondents,
vs.
PETER O. STRANG *et al.*, Appellants.

Judment and order affirmed, opinion by Hardin, J.
A copy. WM. H. SHAFFER,
Special Deputy Clerk.

Filed 22d January, 1881.

107 *Judgment, 22d Jan.*, 1880.

Supreme Court.

AMARIAH H. BRADNER and DANIEL LOWREY, Respondents.
against
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND, Appellants.

The appeal from the judgment in this action coming on to be heard upon the case and exceptions as made and settled herein, after hearing George H. Forster, of counsel for the said defendants, appellants, in favor of a motion to reverse the said judgment and to grant a new trial, after hearing Mr. W. F. Cogswell, of counsel for the said plaintiffs, respondents, in opposition thereto, and due deliberation being had thereon, it is ordered that the said judgment be and the same is hereby in all things affirmed. And it is further ordered and adjudged that the said plaintiffs recover of the said defendants the sum of eighty-two $\frac{39}{100}$ ($82.39) for their costs and disbursements on the said appeal.

N. A. GEARHART, *Deputy Clerk.*

(Endorsed:) Supreme court. Amariah H. Bradner and another *ag'st* Peter O. Strang and others. Judgment-roll. Wood & Scott, pl'tfs' att'ys. Filed and entered January 22d, 1881.

108 Supreme Court.

COUNTY OF LIVINGSTON:

AMARIAH H. BRADNER and DANIEL LOWREY
against
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND.

Take notice that the defendants hereby appeal to the court of appeals from the judgment entered herein on the 22d day of January, 1881, affirming the judgment in this action and for $82.39, and that this appeal is from the whole and from each and every part of such judgment. Dated February 15th, 1881.

Yours, etc., GEORGE H. FORSTER,
Attorney for Defendants and Appellants.

Office and P. O. address, 58 Wall street, New York city.

To WOOD & SCOTT, Esquires,
Attorneys for Plaintiffs and Respondents.
MARK J. BUNNELL, Esquire, *Clerk.*

Filed February 23d, 1881.

109 Supreme Court.

AMARIAH H. BRADNER and DANIEL LOWREY
against
PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND.

LIVINGSTON COUNTY, CLERK'S OFFICE.

I, Mark J. Bunnell, clerk of the supreme court in any for the county of Livingston, having compared the annexed copies, judgment roll, and notice of appeal to the court of appeals in the above-entitled action with the originals on file in this office, do certify that the same are correct transcripts therefrom, and of the whole of said originals.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the supreme court in and for the county of Livingston, this 23d day of February, A. D. 1881.

[SEAL.] M. J. BUNNELL, *Clerk.*

ENDORSED: Supreme court. Amariah H. Bradner *et al.*, respondents, against Peter O. Strang *et al.*, appellants. Return on appeal. George H. Forster, appellants' attorney, No. 58 Wall street. Filed March 2d, 1881.

110 *Order Granted on the 8th day of June*, 1882.

Supreme Court.

At at special term of the supreme court, held at the court-house, in the city of Rochester and county of Monroe, in and for the State of New York, on the eighth day of June, 1882.

Present: Hon. Wm. Rumsey, one of the justices of said court.

AMARIAH H. BRADNER and DANIEL LOWREY, Respondents,
vs.
PETER O. STRANG, JOHN B. HOLLAND, & JOSEPH HOLLAND,
Appellants.

On reading and filing the remittitur from the court of appeals in the above-entitled action, whereby it is adjudged and determined that the judgment of the supreme court appealed from by the said defendants, appellants, be in all things affirmed, with costs of the said court of appeals to the said respondents.

Now, on motion of Mr. James Wood, of counsel for the said plaintiffs, respondents ordered that the said judgment of the court of appeals be, and the same is hereby, made the judgment of this court.

(Endorsed:) Monroe, special term. Rochester, N. Y., June
111 8th, 1882. I hereby certify that the within order was, at this term, and on this day, granted and entered in Livingston county, clerk's office. Wm H. Shaffer, sp. dep. clerk. Filed June 30th, 1882.

112 Supreme Court.

AMARIAH H. BRADNER and DANIEL LOWERY
vs.
PETER O. STRANG, JOHN B. HOLLAND, & JOSEPH HOLLAND.

An appeal having been taken in the above-entitled action by the defendants therein to the court of appeals from the judgment of the general term of this court, and the said court of appeals having heard the said appeal, and having made a judgment & determination thereon, whereby it was considered that the said judgment appealed from be in all things affirmed, with costs.

And the said court of appeals having remitted the said judgment to this court—

It is adjudged and determined that the said judgment of the said court of appeals be, and the same is hereby, made the judgment of this court.

And it is further adjudged and determined that the said plaintiffs, respondents, recover of the said defendants, appellants, the sum of one hundred and five dollars and six cents, costs of said appeal.

Judgment signed June 30th, 1882.

M. J. BUNNELL, *Clerk.*

Endorsed: Supreme court. Amariah H. Bradner & another *vs.* Peter O. Strang *et al.* Judgment-roll. Filed June 30th, 1882.

113 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

[SEAL.]

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Amariah H. Bradner and Daniel Lowery, respondents, and Peter O. Strang, John B. Holland, and Joseph Holland, appellants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of,
114 or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Peter O. Strang, John B. Holland, and Joseph Holland, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and

speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal disinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eighth day of July, in the year of our Lord one thousand eight hundred and eighty-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States

Allowed by—
SAMUEL BLATCHFORD,
Associate Justice of the Supreme Court of the United States.
July 8th, 1882.

115 [Endorsed:] Supreme Court of the United States. Peter O. Strang, John B. Holland, and Joseph Holland, plaintiffs in error, against Amariah H. Bradner and Daniel Lowrey, defendants in error. Writ of error. George H. Forster, attorney for the plaintiffs in error, 58 Wall St., New York city, for Amariah H. Bradner and Daniel Lowrey, defendants in error. Lodged July 15, 1882, in clerk's office.

116 *Assignment of Errors.*

Supreme Court of the United States.

PETER O. STRANG, JOHN B. HOLLAND, and JOSEPH HOLLAND, Plaintiffs in Error,
against
AMARIAH H. BRADNER and DANIEL LOWREY, Defendants in Error.

Of October term in the year of our Lord one thousand eight hundred and eighty-two.

Afterward, to wit, on the first Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Peter O. Strang, John B. Holland, and Joseph Holland, by George H. Forster, their attorney, and say that in the record and proceedings aforesaid, and also in said judgment there is manifest error in this, to wit, that in the record aforesaid it appears that the judgment aforesaid was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error and against the said defendants in error, and also in this, to wit, that said plaintiffs in error claimed that they were entitled, in the court of appeals of the State

of New York to a reversal of the judgment of the supreme
117 court of the State of New York, on the grounds: (1.) That the court below erred in holding that the defendants in error could recover against the plaintiffs in error on the cause of action alleged and proved, notwithstanding that the alleged debt or claim sued on was, by the Revised Statutes of the United States, title Bankruptcy, provable against the several estates of the respective plaintiffs in error, and existed on the 3d day of July, 1875, and that the said plaintiffs in error were, respectively, duly adjudged bankrupts under said title, and were duly discharged from all their debts, and especially from the alleged debt or claim sued on in this action; (2) that the court below erred in refusing to dismiss the complaint as to the plaintiff in error, John B. Holland, because no cause of action was made out against him which was not discharged by his discharge in bankruptcy, granted June 4, 1877; (3) that the court below erred in refusing to dismiss the complaint as to the plaintiff in error, Joseph Holland, because no cause of action was made out against him which was not discharged by his discharge in bankruptcy; (4) that the court below erred in refusing to dismiss the complaint, as to the plaintiff in error, Peter C. Strang; (5) that the court below erred in the charge to the jury; (6) that the court below erred in the refusal to charge the jury as requested on the part of the plaintiffs in error, Holland; that only a debt created by the fraud of a bankrupt was excepted, and that a debt created
118 by the fraud of his partner was not excepted from the operation of a discharge in bankruptcy; (7) that the court below erred in the charge that the plaintiffs in error, Holland, were responsible, jointly, for the fraud of their copartner, if one was perpetrated by him, notwithstanding their discharge in bankruptcy; (8) that the court below erred in the refusal to charge, as requested, as to the plaintiffs in error, Holland, that there being no claim of any fraud perpetrated by him, and no evidence of any fraud perpetrated by him, the alleged debt sued on is not a debt created by his fraud, and his was not liable in the action, but was discharged by his discharge in bankruptcy from all liability in the action; (9) that in the court below there was drawn in question the construction of a statute of the United States, to wit, the Revised Statutes, title Bankruptcy, and the decision was against the title, right, privilege, or exception specially set up in the defendants' answer, and claimed on the trial under said statute, and such decision was affirmed by the said court of appeals, when the court below should have held and decided in favor of said right or exception; and that the said court of appeals should have so held and decided, and should have reversed the judgment of the supreme court of the State of New York on said grounds; but the said court of appeals in fact decided the contrary thereof, and affirmed the said judgment of the supreme court of the State of New York.

And the said Peter O. Strang, John B. Holland, and Joseph
119 Holland pray that the judgment of the court of appeals aforesaid and the judgment of the supreme court of the State of New York aforesaid may be reversed, annulled, and altogether held

for naught, and that they may be restored to all things which they have lost by occasion of the said judgment.

GEORGE H. FORSTER,
Attorney for Plaintiffs in Error, No. 58 Wall Street, New York.

(Endorsed:) U. S. Supreme Court. Peter O. Strang *et al.*, pl'ffs in error, *vs.* Amariah H. Bradner *et al.*, def's in error. Copy assignment of errors. George H. Forster, att'y for pl'ffs in error, 58 Wall street, New York. Filed July 15, 1882.

120 The United States of America to Amariah H. Bradner and Daniel Lowrey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York in and for the county of Livingston, wherein Peter O. Strang, John B. Holland, and Joseph Holland are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Blatchford, Associate Justice of the Supreme Court of the United States, this eighth day of July, in the year of our Lord one thousand eight hundred and eight-two.

SAMUEL BLATCHFORD.

121 [Endorsed:] Supreme Court of the United States. Peter O. Strang *et al.*, plaintiffs in error, against Amariah H. Bradner *et al.*, defendants in error. Citation. George H. Forster, attorney for plaintiff s in error, 58 Wall st., New York city. Service of the citation herein, returnable the second Monday of October, 1882, pursuant to writ of error filed in the clerk's office of the supreme court of the State of New York in and for the county of Livingston, and of said writ of error is hereby admitted, this 15th day of July, 1882. James Wood, att'y for def'ts in error. Filed July 15, 1882.

122 *Indemnity Bond.*

Know all men by these presents, that we, Alexander Holland, land, residing at No. 52 East 25th street, in the city of New York, and Daniel Butterfield, residing at No. 52 East 25th street, in the city of New York, in the State of New York, are held and firmly bound unto Amariah H. Bradner and Daniel Lowrey in the sum of two thousand dollars, lawful money of the United States of America, to be paid to the said Amariah H. Bradner and Daniel Lowrey, their and each of their heirs, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated the third day of July, one thousand eight hundred and eighty-two.

Whereas Peter O. Strang, John B. Holland, and Joseph Holland have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of New York, upon the remittitur of the court of appeals of the State of New York, affirming a judgment of the supreme court of the State of New York, rendered on the 22d day of January, 1881, with one hundred and five & $\frac{6}{100}$ dollars costs of appeal, which last mentioned judgment affirmed, and then judgment of the supreme court rendered, on the 19th day of February, 1880, with eighty-two & $\frac{32}{100}$ dollars costs of appeal to the general term, which last mentioned judgment, rendered February 19, 1880, was in favor of the above-named Ameriah H. Bradner and Daniel Lowrey, and against the said Peter O. Strang, John B. Holland, and Joseph Holland, for the sum of seventeen thousand nine hundred and seventy-four & $\frac{28}{100}$ dollars:

Now, therefore, the condition of this obligation is such, that if the said Peter O. Strang, John B. Holland, and Joseph Holland shall prosecute their said writ of error to effect, and if they fail to make their plea good shall answer all costs, then this obligation to be void; otherwise, the same shall be and remain in full force and virtue.

123

ALEX. HOLLAND. [L. S.]
DANIEL BUTTERFIELD. [L. S.]

Sealed and delivered in presence of—
EDWARD W. PRICE.

STATE OF NEW YORK, }
City & County of New York, } *ss.:*

On this fifth day of July, 1882, personally appeared before me Alex. Holland and Daniel Butterfield, severally known to me to be the individuals described in, and who executed, the foregoing bond and severally acknowledged to me that they executed the same for the purposes therein mentioned.

EDWARD W. PRICE,
Notary Public (83), *N. Y. Co.*

STATE OF NEW YORK, }
City & County of New York, } *ss.:*

Alex. Holland and Daniel Butterfield, of said city, being severally duly sworn, each for himself, says that he is a resident and freeholder in the State of New York, and is worth the sum of two thousand dollars over and above all debts and liabilities which he owes or has incurred, and besides property exempt by law from execution.

ALEX. HOLLAND.
DANIEL BUTTERFIELD.

Severally subscribed and sworn before me, this fifth day of July, 1882.

EDWARD W. PRICE,
Notary Public, N. Y. Co.

Approved July 8th, 1882.

SAMUEL BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

124 [Endorsed:] Supreme Court of the United States. Peter O. Strang, John B. Holland, and Joseph Holland, plaintiffs in error, against Amariah H. Bradner and Daniel Lowrey. Bond in error. Dated July 3rd, 1882. George H. Forster, attorney for plaintiffs in error, No. 58 Wall street, New York. Filed July 15th, 1882.

125 AMARIAH H. BRADNER and DANIEL LOWERY, Respondents,
vs.
PETER O. STRANG, JOHN B. HOLLAND, & JOSEPH HOLLAND, Appellants.

4 Department. Submitted October, 1880. Decided December, 1880.

Appeal from an order denying a motion made upon the minutes for a new trial, and from a judgment entered upon a verdict taken in the Livingston circuit against the defendants.

George H. Forster for appellants; W. F. Cogswell for respondents.

HARDIN, *J.*:

126 The action was brought to recover damages for fraudulently procuring from the plaintiffs, who were dealers in wool and sheep-skin at Rochester, four promissory notes which the defendants had discounted for their benefit, and upon which they realized the proceeds of such discount.

The notes were negotiable, and passed from the defendant into the hands of *bona-fide* holders, and the plaintiffs were subsequently obliged to and did pay the same.

The defendants, who were copartners, were carrying on business in New York, and they become and were the correspondents of the plaintiffs.

The plaintiffs in the course of this business shipped to the defendants the wool and sheep skin, drew drafts on them, and also sent them notes for discounts, and through a long course of business covering numerous transactions the parties exchanged credit.

127 Upon the 27th of March, 1875, one of the defendants wrote to the plaintiff, and in the letter stated a summary of the accounts between the parties, as the defendants claimed, and in that letter he said, viz: "The notes we have received are all good, only we can't get money on them alone; and in the mean time we have paid about $30,000 of your notes, which these last were given to renew in part.

"We have $16,000 worth of notes not used.

"The actual balance of the account is about $40,000, to which is to be added your notes for $16,000."

Upon the second day of April, 1875, another letter was written to the plaintiff, in which the defendant states, viz: "Your notes which have recently run off I might get renewed if you would send me say four notes having about three months to run and payable at the Metropolitan National Bank, New York. * * * I dare
128 not offer the notes we have of yours when the last run off were used, because the place where these notes are payable is at our office, and it would put them on inquiry at once."

After these notes were received, and relying upon the statement therein contained, the plaintiff sent to the defendants their four promisory notes.

The defendants took these notes and also procured them to be discounted, and the plaintiffs subsequently paid them.

Upon the trial each of the plaintiffs testified that they relied upon the statements quoted from the letters. We think it was entirely competent to prove such reliance upon these statements as true by the plaintiffs.

The defendants held relations of confidence toward the plaintiff, and were by such statements enabled to induce the plaintiff
129 to act thereon as the evidence amply warranted the jury in finding.

The case of Dambman *vs.* Schulting, 75 New York, 55, cited by the appellant, contains nothing inconsistent with such doctrine.

The representations before us, the jury were authorized to find, were such as were calculated to, and did, mislead the plaintiffs. The relations of trust and confidence existing between the two firms were such as might well induce the plaintiffs to rely upon such representations.

Burch *vs.* Sheldon, 14 Barber, 66.
Paul *vs.* Hadley, 23 Barber, 521.
Storey's Eq., Section 207.
75 New York, *supra.*

The substantial fact stated in the letters in effect was that the notes had not been discounted, and therefore these proceeds applied upon the accounts, and because of that fact the plaintiffs might, as business men, yield to the solicitation for further
130 notes to be used in procuring funds to apply toward reducing their account with the defendants.

Suffiice it to say, the evidence authorized the jury so to find, as their verdict indicates they did find. Upon the trial there was an offer to show by the defendant, Holland, that there was not any interest to defraud in sending the letters; but it always appeared that the letters were written by their partner and co-defendant, Strang, and the evidence was therefore excluded. The fraud, if any, was perpetrated by Strang, and it was not a defense in his mouth that his co-partners did not intend a fraud, nor was it a defense to

them to show their co-partners made the representations in the course of the firm business without their active participation therein.

52 Barber, 345.

2 Sanford, 241.

In the case of Still *vs.* Little, 63 New York, 435, it was
131 held that a knowledge of the falsity of the representation made or that it was made with intent to deceive, must be shown and found by the jury; but in the case before us it is impossible to conceive that the absence of an actual intent to deceive, in the breast of Holland, would be a defense to Strang as a defense to therein.

The Hollands, being partners, are chargeable with the affirmative acts and declaration- of Strang, by means of which this firm received the notes, procured them discounted, and enjoyed the proceeds thereof. Hence the readings upon the trial allowing Strang to testify that he had no fraudulent intent in writing the letters, was proper, and it was equally proper to exclude the evidence of Hollands in respect to their having no such intent.

Indeed, the court assumed that they possessed no such
132 actual intent, and were chargeable only upon the principle that Strang's acts and declarations were those of their agent, as they were his copartners, participators in the fruits of the alleged fraud.

52 Barber, 345.

2 Sanford, 241.

The defendants were adjudicated bankrupts July 3, 1875, and discharged June 1, 1877, and such discharge was set up and insisted upon at the trial; it was overruled by the court, and the defendants, Holland, now insist that they were discharged from the claims made herein against them in common with Strang, their copartners.

It was held in Henriques *vs.* Clews, 79 New York, 429, the *the* same "fraud" as used in the bankrupt act, declaring what debts should not be discharged, relates to affirmative, express fraud, and not to frauds by implicatiou.

In Meal *vs.* Clark, 95 U. S. Reports, 704, it was construed
133 to mean positive fraud, or fraud involving moral turpitude or intentional wrong.

We think it very clear that under the principles of these cases Strang was not discharged in bankruptcy from the claims made against him in this action. Libbie *vs.* Shasburger, 14 Hun., 120; Talcott *vs.* Harris, 18 Hun., 567; Argan *vs.* Jacobs, 21 Hun., 115. Though his act is the one which casts a liability upon the Hollands, we think as he being their partner, and as such, their agent, that they through him are chargeable with an express positive fraud, and they by receiving the fruits of his fraudulent act, adopted the act which worked a fraud upon the plaintiffs.

The discharges [in] bankruptcy were unavailing to the defendants or either of them.

The proofs given by the plaintiffs established the false representa-

tion, by means of which they were induced to part with their notes to the defendants.

134 That the defendants procured them to be discounted and to receive the avails thereof; and that the plaintiffs were obliged to pay and take up the notes, and the extent of the damages sustained by the plaintiff, and we see no exceptions in the course of the trial which should lead us to distrust the verdict. Section 1003 of Code Civil Procedure. The order and judgments must be affirmed.

Order and judgment affirmed.

Tallcott, P. J., & Rumsey, J., concur.

[Endorsed:] Supreme court. Bradner *vs.* Strang. Copy opinion, gen. term. Clerk's fee 2.25. Cornelia L. Arnold. Ex'd.

135 Court of Appeals.

AMARIAH H. BRADNER and DANIEL LOWREY, Respondents,
vs.
PETER O. STRANG *et al.*, Appellants.

George H. Forster for appellants.

William F. Cogswell for respondents.

EARL, J.:

This action was brought by the plaintiffs to recover damages which they allege they sustained in consequence of the false and fraudulent representations of the defendants. The defendants, in their answer, among other things, denied the alleged fraud, and alleged that they had been discharged in bankruptcy. The material facts of the case are as follows:

In the years 1873, '4, '5, the plaintiffs, under the firm name of Lowery and Bradner, were dealers in wool and sheepskins
136 at Rochester, and the defendants, under the firm name of Strang and Holland Bros., were commission merchants in the city of New York. During the years mentioned the plaintiffs had extensive business transactions with the defendants, sending them large quantities of wool to be sold upon commission, and during the same time it was the habit of the parties to exchange credits, and they had with each other large and numerous financial transactions. They drew drafts on each other, and the plaintiffs from time to time sent their notes to the defendants to be used by them in their business. On the first of March, 1875, there were a number of drafts outstanding drawn by the plaintiffs upon and accepted by the defendants, and at the same time there were eight notes outstanding and running to maturity, which had been made by the plaintiffs and sent to the defendants, and which had been
137 negotiated by the defendants. On the first of March, the defendants wrote the plaintiffs a letter, requesting them to make and forward six notes, dated respectively February 1st, 9th, 15th, 20th, 23rd, and 26th, each at four months, and for a little more than $4,320, to meet six other notes of the plaintiffs described

in the letter, which would fall due in the month of March. They were requested to draw all the notes payable to their own order at the office of the defendants in the city of New York.

In response to that letter they immediately made four notes, one for $4,325.50, dated February 1st; one for $4,326.25, dated February 9th; one for $4,327.13, dated February 15th, and another for $4,327.15, dated February 20th, all at four months, payable to their own order at the office of the defendants, in the city of New York, and they endorsed the notes and sent them to the defendanrs. Before the 27th day of March the defendants had negotiated and
138 used those notes. On the 27th of March the defendants wrote another letter to the plaintiffs, the letter being written by the defendant Strang, and addressed to the plaintiff Lowery, in which it was stated, "The notes we have received are all good, only we can't get money on them alone, and in the meantime we have paid about $30,000 of your notes, which these last were given to renew in part;" that, "We have $16,000 worth of notes not used;" that, "You have notes coming due early in April, and if you are going to pay them you had better arrange to do it." On the 2nd day of April the defendants again wrote to the plaintiffs, the letter being signed and addressed in the same way as the prior one, stating that, "Your notes, which have recently run off, I might get renewed if you would send me, say, four notes having about three months to run, and payable at the Metropolitan National Bank, New York.
139 I might use them. Have them for about $4,000 each, but let the amounts be odd," and that, "I dare not offer the notes we have of yours where the last run off were used, because the place where these are payable is at our office, and it would put them on inquiry at once."

In pursuance of the request contained in this letter, the plaintiffs sent to the defendants four notes, one dated March 13th, 1875, for $4,850; one dated March 14th for $4,951.25; one dated March 16th for $4,860.30, and other dated March 20th for $4,970, all at four months, payable to their own order at the Metropolitan National Bank, New York, and endorsed by them. The defendants received those notes and negotiated them and received the proceeds thereof. On the 4th day of June thereafter, the defendants being insolvent, failed, and petitions in bankruptcy were filed against them on the 3rd day of July thereafter, and in June, 1877, they received
140 their discharges in bankruptcy. At the time of their failure the defendants were indebted to the plaintiffs on all the accounts and transactions between them about the sum of $1,000 aside from the proceeds received by them upon the four notes last-above mentioned, which notes, having passed into the hands of *bona fide* holders, the plaintiffs were subsequently obliged to pay. The plaintiffs claim that the defendants falsely represented in their letters of March 27th and April 2nd, that the four notes which they had sent in response to the letter of March 1st had not been used, and that, in reliance upon such representations, they made and sent to the defendants the four notes in response to the letter of April 2nd, & that they were damaged by the false representations to the amount

of the sum which they were obliged to pay upon the four
141 notes, which, together with interest at the time of the trial, amounted to $17,518.86.

We think there was evidence sufficient to establish plaintiffs' cause of action. It is clear and undisputed from the evidence that on the 27th of March, and on the 2nd of April, the defendants had negotiated and used all the notes which they had received from the plaintiffs.

It appears that some time about the 1st of December, 1874, the plaintiffs sent to the defendants four notes of $4,000 each, which fell due respectively March 5th, 8th, 10th, and 13th, 1875. Those notes were credited to the plaintiffs in the account kept by the defendants with them December 7th, 1874. The defendants claim that they had not used those notes, and that those were the $16,000 of notes not used referred to in the letters of March 27th and April 2nd. We cannot assent to this claim. There is no proof to sustain it, and the just inference from all the evidence is against it.
142 It cannot be inferred from anything in the case that the defendants held notes from about the 1st of December until about the 1st of April without using them and without notifying the plaintiffs that they had not used them. It does not appear where those notes were payable. They were mentioned in the letter of March 1st as notes soon to mature, which would have to be paid either by the plaintiffs or defendants, and the new notes requested in that letter were to cover those four notes and two others to fall due later. The reference in the letter of March 27th, to the "$16,000 worth of notes not used," must have been to the four notes sent in response to the letter of March 1st, which were the last notes preceding the 27th of March, and not to the four notes of $4,000 each, which were then past due, and had probably been paid and taken up by the defendants. It is true that the four notes sent in
143 response to the letter of March 1st amounted to more than $16,000, but the amount was sufficiently accurate to convey to the minds of the plaintiffs a description of the notes intended. Again, it is clear that in the letter of April 2nd Strang intended to convey the impression to the plaintiffs that the four notes not used were those last sent in response to the letter of March 1st, because he assigns as a reason for not using them that they were payable at the office of the defendants, and those notes were so payable.

We are unable to perceive that it would aid the defendants if they could show that they had reference in the letters when speaking of notes not used to the four notes of $4,000 each, because it is equally clear upon the evidence that those four notes had been used prior to the 27th day of March. They must have been negotiated and in the hands of other parties, as they are charged in one of the accounts rendered by the defendants as paid by them. One is
144 charged as paid on the 8th of March, the day it fell due, and the others are charged under date of March 30th, and they were undoubtedly paid as they fell due. It cannot be successfully claimed that the false representations contained in the two letters were not material, or that the plaintiffs did not have the right to

rely upon them. It does not appear that the defendants were bound or under any obligations to make & deliver the last four notes, and it does not appear that they would have done so, but for the false representations. It appears that they were willing to send four notes to the defendants for upwards of $4,000 each, and after they had sent such notes they were induced to send four more by the false representation that those sent had not been used. Such a representation inducing action by parties to whom it was made is unquestionably material.

145 It matters not what the state of the accounts between the parties was at the time the last notes were sent. It is clear that the plaintiffs were then not actually indebted to the amount of those notes. The state of the accounts between the parties has real importance only as it bears on the *quantum* of damages. If the plaintiffs actually owed the defendants the amount of the notes, and were never obliged to pay on them any more than they honestly owed the defendants, then they were not materially damaged by the fraud. But it turned out that when the defendants failed, and when the plaintiffs were obliged to pay the notes, they did not owe the defendants anything, and were damaged by their fraud to the full amount of the payments upon the notes.

It matters not that the plaintiffs were credited with the four notes sent in response to the letter of March 1st, in an account ren-
146 dered to them on March 31st, 1875, before the last notes were sent, because they testified that they did not infer from the account that the notes had been used, but relied upon the statements contained in the letters that they had not been used.

On the 30th of June, 1875, the defendants rendered to the plaintiffs a statement of the accounts between them, in which the plaintiffs were credited with the proceeds of the notes last sent, and the plaintiffs retained that account down to the commencement of this action, all the time knowing of the fraud which they allege had been perpetrated upon them. The defendants therefore claim that the account so rendered became an account stated, and that they thus accepted a credit for the proceeds of the notes, and cannot, therefore, claim anything on account of the alleged fraud.

147 At the date when that account was rendered the notes had not fallen due, and if the defendants had paid them no damage would have been caused to the plaintiffs by the fraud. The damage arose afterward, when the plaintiffs were obliged to pay the notes. By retaining the account, therefore, which gave the plaintiffs no benefit whatever, the fraud was not condoned or waived, and it is impossible to see how they were barred in any way of their right to recover damages on account thereof. Merely crediting the notes in the account did not pay them, and certainly did not satisfy any damages caused to the plaintiffs by the fraud.

The defendants Holland appear to have been entirely guiltless of any participation in the fraud perpetrated by Strang, but it is elementary law that they are chargeable and legally responsible for the fraud perpetrated by their partners in the transaction of

148 the partnership business and the conduct of the partnership affairs.

The claim of the plaintiffs for damages on account of the fraud committed upon them by the defendants was not discharged by the bankruptcy proceedings. Debts only are provable in bankruptcy, and, therefore, only can be discharged in bankruptcy. (U. S. Revised Statutes, secs. 5114, 5117, 5119.) This claim for damages could no more be discharged in bankruptcy than a claim for damages caused by libel, slander, or assault and battery. Morse *vs.* Hutchins, 102 Mass., 439; *In re* Devo, 2 B. R., 11. The cases of Hennequin *vs.* Clews, 77 N. Y., 429, and Neal *vs.* Clark, 95 U. S. R., 704, do not apply to a case like this. The defendants Holland, while they did not actually participate in perpetrating this fraud, are liable *civiliter* for the fraud to the same extent as if they had participated.

149 Therefore the trial judge properly refused to nonsuit the plaintiffs.

During the progress of the trial the counsel for the defendants took numerous exceptions to rulings upon questions of evidence, and to the charge and refusals to charge, as requested, the most important of which, not substantially covered by what has already been said, will be briefly noticed. There was no error in allowing the plaintiffs to testify that in sending the last four notes they relied upon the statements contained in the letters of March 27th and April 2d. Such evidence has frequently been held admissible. There was no error in refusing to permit the defendants Holland to testify they did not have any intention to deceive and defraud the plaintiffs in obtaining the four notes, because there was no claim that they, personally, did obtain them, or that they knew any-

150 thing about the contents of the two letters, or that they, or either of them, had any fraudulent intent. The only fraudulent intent relied upon by the plaintiffs was that of the defendant Strang, which was imputable to the other defendants. There was no error in refusing to allow either of the defendants to testify for what purpose the last four notes were obtained. A purpose is disclosed in the letters, and it would not aid the defendants to show that the notes were obtained for a different purpose; and so long as the fact remained that the notes were obtained by fraud, it is not perceived how the undisclosed purpose for which they were obtained could be material.

The plaintiff Bradner testified that he saw Strang a few months after the failure of the defendants, and was told by him that

151 when he got a discharge in bankruptcy, if he got one, he would have the ability and disposition to make an honorable settlement with the plaintiff. This evidence was not objected to by the defendants. The counsel for the defendants requested the court to charge that the jury should disregard such evidence, as that conversation was not a new promise, and was not legally binding upon Strang or either of the other defendants. No allusion was made to that evidence in the charge of the judge. It did not show a new promise, and was wholly immaterial and irrelevant. It is impossible to perceive how the evidence could have harmed the defend-

ants; and while the court could properly have granted the request, it is not perceived that the refusal to grant it was prejudicial to the defendants. If they regarded the evidence as prejudicial, they should have objected to it at the time it was offered.

152 The exceptions contained in the case are very numerous, but we have carefully examined and considered them all, and without further giving any of them particular notice, it is sufficient to say that we are of opinion that no one of them is well founded. The judgment should be affirmed, with costs.

"All concur except Danforth, J., who takes no part, and Tracy, J., absent."

A copy. H. E. SICKLES, *Reporter, per C.*

153 [Endorsed:] Bradner *vs.* Strang. Opinion Earl, J. xd. 4.50

154 STATE OF NEW YORK:

Supreme Court, Clerk's Office.

PETER O. STRANG & others, Plaintiffs in Error,
against
AMARIAH H. BRADNER and another, Defendants in Error.

To the Supreme Court of the United States:

I, Mark J. Bunnell, clerk of the supreme court in and for the county of Livingston, do hereby certify that the annexed papers constituted the original return and the whole thereof upon which the supreme court of the State of New York acted in rendering judgment herein, together with the remittitur and opinion of the court of appeals and the record, judgment roll, exceptions, and opinion of the supreme court of the State of New York, and the citation bond, writ of error, and assignment of errors to the Supreme Court of the United States herein.

In witness whereof, I have hereunto set my hand and affixed my official seal, at Geneseo, in the county of Livingston, this 21st day of July, A. D. 1882.

[SEAL.] M. J. BUNNELL,
Clerk of the Supreme Court in & for the County of Livingston.

155 [Endorsed:] Supreme Court of the United States. Peter O. Strang, John B. Holland, and Joseph Holland, plaintiffs in error, *vs.* Amariah H. Bradner and Daniel Lowrey, defendants in error. Return. George H. Forster, att'y for pl'ffs in error, 58 Wall St., New York.

156 Endorsed on cover: New York supreme court. (Remittitur.) No. 246. Peter O. Strang, John B. Holland, and Joseph Holland, plaintiffs in error, *vs.* Amariah H. Bradner and Daniel Lowrey. Filed 1st August, 1882.

114-555

Supreme Court of the United States.

October Term, 1884.

JOHN B. HOLLAND AND JOSEPH HOLLAND,
SURVIVORS,
PLAINTIFFS IN ERROR,
vs.
AMARIAH H. BRADNER AND DANIEL LOWREY,
DEFENDANTS IN ERROR.

No. 246.

Sections of Revised Statutes referred to in argument:

SEC. 5067. All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing, but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the Court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

SEC. 5117. No debt created by the fraud or embezzle-

ment of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

SEC. 5118. No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt either as partner, joint contractor, endorser, surety, or otherwise.

SEC. 5119. A discharge in bankruptcy, duly granted, shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. * * *

114-555

Office Supreme Court U. S.
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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 246.

PETER O. STRANG, JOHN B. HOLLAND and JOSEPH HOLLAND,
Plaintiffs in error.

vs.

AMARIAH H. BRADNER and DANIEL LOWERY,
Defendants in error.

BRIEF FOR PLAINTIFFS IN ERROR.

GEORGE H. FORSTER,
of Counsel for Plaintiffs in error.
No. 58 Wall St., New York City

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

JOHN B. HOLLAND and JOSEPH HOLLAND, impleaded, *Plaintiffs in Error*, *against* AMARIAH H. BRADNER, and DANIEL LOWREY, *Defendants in Error.*	No. 246.

In Error to the Supreme Court of the State of New York.

Brief for Plaintiffs in Error.

STATEMENT OF THE CASE AND PROCEEDINGS AT THE TRIAL AND IN THE COURT BELOW.

This action was brought in May, 1878, in the Supreme Court of the State of New York, by Amariah H. Bradner and Daniel Lowrey, who in 1875 did business at Rochester, New York, under the firm name of

Lowrey & Bradner, against Peter O. Strang, John B. Holland and Joseph Holland who did business in New York City, under the firm name of Strang & Holland Brothers, to recover the sum of $17,518.88, which Lowrey & Bradner paid to take up certain notes made by themselves at the request of Strang & Holland Brothers, and delivered to them for their accomodation and which Strang & Holland Brothers were under obligation and bound to pay at maturity, but did not pay, by reason whereof Lowrey & Bradner paid them, and claimed that they had been fraudulently procured from them, by the false representations of Peter O. Strang. The representations were contained in certain letters of Peter O. Strang, written in the spring of 1875, under the following circumstances: Lowrey & Bradner, were engaged in the business of buying wool and sheep skins at Rochester, which they shipped to the consignment of Strang & Holland Bros., at New York, who made advances to them by accepting their drafts. There had been regular accounts running between the parties for years. Among other items in these accounts were certain notes made by Lowrey's firm, and sent by them to Strang's firm. The notes were payable in New York, and when received were at once credited to Lowrey's firm in account, the interest being adjusted in the interest account from the day of the maturity of the notes to the day of the rendition of the account. When the notes fell due, Strang's firm would pay them for Lowrey's firm and charge them in account the amounts so paid.

They would provide for such payments by sending new notes or by accepting sight drafts, as the case might be. Lowrey's firm would also draw time drafts on Strang's firm which they accepted and charged in the

account. This course of dealing is clear from accounts between April 1st, 1873, and December, 1874, pages 52-63, as well as from the testimony of the parties, pages 6, 9,15. On December 7th, 1874, pursuant to this course of business, Lowrey's firm were credited with four notes each for $4,000, in all $16,000, due respectively March 5th, 8th, 10th and 13th, (Page 57). After such credit the balance of account due by them December 18th, 1874, was $39,993.05. On January 4th, 1875, pursuant to this course of business, they were credited with four notes for $4,250, $4,251.32, $4,251.33, and $4,200 due respectively March 24th and 29th, and April 2d and 8th (Page 59). In that position of matters Strang wrote the letter of March 1st, 1875, (Page 49). In that letter he called attention to the first six of these eight notes as given and credited in account, describing them accurately, and added, "now, some way must be pro-"vided to pay these notes, and we most earnestly desire "you to pay attention to them. If you will send us on "say six notes, as per memorandum on the other side, "we will do our level best to get them, or as many of "them as possible discounted to cover these above." (Page 49).

The memorandum referred to called for six notes, dated

February	1st,	4 months,	due June	4th,	$4,325 50.
"	9th,	4 "	"	12th,	4,326 25.
"	15th,	4 "	"	18th,	4,327 13.
"	20th,	4 "	"	23rd,	4,327 15.
"	23rd,	4 "	"	26th,	4,326 25.
"	26th,	4 "	"	29th,	4,325 50.

(Page 50).

Lowrey's firm sent four of the six notes called for, in accordance with the directions in the letter, (Page 15,) Strang's firm credited these four notes, under date March 8th, in the account of March 31st, (Page 61). They placed the notes in the hands of O. M. Bogart & Co. (Page 13). Bogart & Co. sold them March 9th, 23d and 25th, 1875, (Pages 68, 70 and 4). March 27th, Strang wrote the letter of that date, Exhibit 2 (Page 50). Strang's firm had then paid five of the six notes due in March, they had only received four of the notes to renew the same. He wrote, among other matter, "The notes we "have received are all good, only we can't get money "on them alone, and in the meantime, we have paid "about $30,000 of your notes, which these last were "given to renew in part. Hence the statement if cor- "rected, would be about as follows (then follow figures.) "And we have $16,000, worth of notes, not used. The "actual balance of the account is about $40,000, to "which is to be added your notes for $16,000. If you "pay the notes, then the balance will be $40,000. Our "bookkeeper has just returned, and he will get your "account ready, and send it to you on Monday. You "have notes coming due early in April, and if you intend "to pay them you had better arrange to do it. If you "don't intend to pay them, they will go to protest. You "have a note due Monday, and if you want us to pay "it, you had better telegraph us at once on receiving "this, to do so, and draw on you for the money." Strang's firm paid the note for $4,251.32, "due Mon- "day," and charged it to Lowrey's firm, in their account (Page 60). The account made up March 31st, 1875 credited to Lowrey's firm the four notes. It was ren- dered to them March 31st, 1875, with the letter of that

date, in which their attention is called to the fact that "by this, you will see that you owe us as cash this day, "$34,372.86, and this leaves you your notes to pay" (Page 51). Two days later, April 2d, Mr. Strang wrote Mr. Lowrey: "I presume you will do all you can, but "when you don't do but precious little, you must expect "to be spurred up. * * * Your note due to-day "we have paid, although you did not remit us to cover "it. Now, Daniel, I expect you to protect our draft "drawn on you this last time, without drawing on us "at sight. Your notes which have recently run off, I "might get renewed, if you would send me, say, four "notes, having about three months to run, and payable "at the Metropolitan National Bank, N. Y. I might "use them. Have them for about $4,000 each, but let "the amounts be odd.

"I dare not offer the notes we have of yours where "the last run off were used, because the place where "these are payable is at our office, and it would put them "on inquiry at once." This letter was not written till the day following the receipt of the account, and of the letter of March 31st, enclosing the same which were received April 1st, (Page 6.) When it was written there were four notes, for which they had not sent renewal notes, the three due March 24th and 29th, and April 2nd which Strang's firm had paid, and that due April 8th, not then due. Four notes were sent in response to this letter for $4,850., $4,951.25, $4,860.30, $4,970, respectively. These notes were credited in the account of June 30th, underdate May 11th, (Page 63). A copy of a letter dated April 8th, was produced, which enclosed the notes; Lowrey's firm subsequently took these notes up paying sixty per

cent. for three of them, and the fourth in full. On these facts the action brought was not in tort but on the contract; the complaint alleged that the notes were made by Lowrey's firm for the accommodation of Strang's firm, and that Strang's firm was under obligation and bound to pay the same at maturity, which it failed to do, and that Lowrey's firm was duly charged as makers and endorsers, and made liable and compelled to pay, and did pay the same. The answer set up the discharge in bankruptcy of John B. Holland and Joseph Holland, June 1st, 1877, as a defence, (Page 37 and 38). On this defence there was presented by the record herein, and on the trial of this action, a question for review by this Court, wherein was drawn in question the construction of sections 5114 to 5119, of the Revised Statutes of the United States, title Bankruptcy, John B. Holland and Joseph Holland claiming that their discharge in bankruptcy under such sections, exempted them from liability in this action, and the decision in the State Court being against such right and exemption. The question so involved was raised by the pleadings and on the trial as appears by the record. The discharges in bankruptcy were set out in full in the answer, (Page 37, 38.) The knowledge of Bradner, of the discharge in bankruptcy, was proved, (Page 12.) The debt was not created by the fraud of John B. Holland or Joseph Holland.

The proof in support of the action only tended to impute fraud to Peter O. Strang, no fraud was charged against either of the Hollands. On the examination of John B. Holland he was asked. "Q. Was there any "intention of deceiving or defrauding Lowery & Brad- "ner, or either of them in obtaining these four notes?

"Plaintiffs objected on the ground that this was not "the gentlemen who had the intent; objection sus- "tained; evidence excluded; defendants duly ex- "cepted;" Joseph Holland testified, "I was discharged "in bankruptcy June 1st, 1877. Discharges of Jo- "seph Holland, John B. Holland and Peter O. Strang "read in evidence, it is admitted that these are the dis- "charges which are set forth in the answer, Q. Had "you any intention at any time of deceiving or de- "frauding these plaintiffs in respect to these notes? "Excluded on the ground that he had no knowledge of "the act constituting the alleged fraud. Defendants "duly excepted," (Page 14). The testimony being closed a motion was made to dismiss the complaint.

"2d. Separately on behalf of John B. Holland, because "no cause of action is made out against him, which was "not discharged by his discharge in bankruptcy grant- "ed June 1st, 1877."

"3d. Separately on behalf of Joseph Holland, be- "cause no cause of action is made out against him "which is excepted by law from the operation of his "discharge in bankruptcy." (Page 17). The motion was denied.

The defendant John B. Holland, duly and specifically excepted to the denial of the separate motion in his behalf.

The defendant Joseph Holland, duly and specifically excepted to the denial of the separate motion in his behalf.

The Court among other things charged the jury as follows:

"Partners are liable for the fraudulent acts of a co-"partner in the business of a partnership, so that the "brothers Holland stand here with an entire absence "of testimony tending to charge them with knowledge "of these false representations, and that they had no "such knowledge appears by their own testimony.

"They are however responsible jointly with their "copartner for the fraud, if one was perpetrated by "him. (Pages 18 and 19.)

"It seems undoubtedly a hard rule in many cases, "and possibly this is one of the strong cases that men "who have no knowledge of the perpetration of a "fraud should be held responsible with the party who "had full knowledge, but is one of the burdens which a "man assumes when he enters into the intimate rela-"tion of copartnership in business. He assumes the "responsibility, civilly of even fraudulent acts, commit-"ted in the course of the business by his copartner."

"Mr Forster excepted on the part of the defend "ant's Holland to the application of the law in "regard to the liability of the partners, in "that there was an omission to make quali-"fication of it by reason of the bankrupt act, and "asked the court to charge that only a debt created by "the fraud of a bankrupt was excepted, and that a debt "created by the fraud of his partner was not excepted."

The court declined so to charge, to which refusal the plaintiffs in error excepted.

Also to the charge " that the defendants Holland, "were responsible jointly, for the fraud of their copart-"ner, if one was perpetrated by him." (Page 25).

Mr. Forster requested the court to charge as to John B. Holland, "that there being no claim of any fraud

"perpetrated by him and no evidence of any fraud per-
"petrated by him, this is not a debt created by his
"fraud, and he is not liable in this action, but is dis-
"charged, by his discharge in bankruptcy from all lia-
"bility in this action."

The Court declined so to charge, to which refusal the plaintiff in error, John B. Holland, duly excepted.

Mr. Forster made the same request as to Joseph Holland.

The Court declined so to charge, to which refusal the plaintiff in error Joseph Holland, duly excepted. (Page 26.) The jury found a verdict for $17,517.86, (Page 30,). On appeal to the General Term, and the Court of Appeals, the judgment entered on the verdict was affirmed, and the defendants below took out a writ of error to this Court, (Page 75.) The opinions in the Court below ruled the question as to the discharge in bankruptcy against the Hollands, (pp. 82, 83, 87,) Peter O. Strang died after the cause was docketed in this Court.

ASSIGNMENT OF ERRORS.

It is assigned for error by the plaintiffs in error.

1st. Assignment of error. That the Court below erred in holding that the defendants in error could recover against the plaintiffs in error on the cause of action alleged and proved, notwithstanding that the alleged debt or claim sued on was, by the Revised Statutes of the United States, title Bankruptcy, provable against the several estates of the respective plaintiffs in error, and existed on the 3d day of July, 1875, and that the said plaintiffs in error were respec-

tively, duly adjudged bankrupts under said title, and were duly discharged from all their debts, and especially from the alleged debt or claim sued on in this action.

2d. Assignment of error. That the Court below erred in refusing to dismiss the complaint, as to the plaintiff in error, John B. Holland, because no cause of action was made out against him, which was not discharged by his discharge in bankruptcy, granted June 1st, 1877.

3d. Assignment of error. That the Court below erred in refusing to dismiss the complaint as to the plaintiff in error, Joseph Holland, because no cause of action was made out against him, which was not discharged by his discharge in bankruptcy.

4th. Assignment of error. That the Court below erred in the charge to the jury.

5th. Assignment of error. That the Court below erred in the refusal to charge the jury as requested on the part of the plaintiffs in error, Holland, that only a debt created by the fraud of a bankrupt was excepted, and that a debt, created by the fraud of his partner was not excepted from the operation of a discharge in bankruptcy.

6th. Assignment of error. That the Court below erred in the charge that the plaintiffs in error, Holland, were responsible, jointly for the fraud of their co-partner, if one was perpetrated by him notwithstanding their discharge in bankruptcy.

7th. Assignment of error. That the Court below erred in the refusal to charge, as requested, as to the plaintiffs in error, Holland, that there being no claim of any fraud perpetrated by them and no evidence of any fraud perpetrated by them, the alleged debt sued on is not a debt created by their fraud, and they were not liable in the action, but were discharged by their discharge in bankruptcy from all liability in the action.

8th. Assignment of error. That in the Court below there was drawn in question the construction of a statute of the United States, to wit, the Revised Statutes, title Bankruptcy, and the decision was against the title, right, privilege or exception specially set up in the defendants' answer, and claimed on the trial under said statute and such decision was affirmed by the said Court of Appeals, when the Court below should have held and decided in favor of said right or exception, and that the said Court of Appeals should have so held and decided, and should have reversed the judgment of the Supreme Court of the State of New York, on said grounds, but the said Court of Appeals in fact decided the contrary thereof, and affirmed the said judgment of the Supreme Court of the State of New York.

BRIEF OF THE ARGUMENT FOR THE PLAINTIFFS IN ERROR.

First Point. The discharges in bankruptcy, granted June 1st, 1877, to John B. Holland and Joseph Holland, discharged them from all debts and claims provable against their several estates, which existed on the 3rd day of July, 1875, excepting such debts, if any as are by law excepted from the operation of a discharge in bankruptcy. Discharge, (pp. 37 and 38,) Sections 5115, and 5119, of U. S. Revised Statutes.

Second Point. The claim in question was provable against their estates in bankruptcy. The debt in question in this action, arose from four promissory notes, made by Lowrey's firm, about April 4th, 1875, and delivered to the firm in which the Hollands were partners, at the request of such firm and for its accommodation, which were endorsed and negotiated by that firm, and which that firm was under obligation and bound to pay at maturity. The failure to pay the same at maturity, and the due protest of the same,

compelled Lowry's firm to take them up, and on their taking them up the Hollands' firm became liable to repay to Lowrey's firm the amount so paid to take them up; this was the amount for which the verdict was rendered; this debt was due from the day that the Hollands' firm endorsed the notes and negotiated them. When they sold the notes they became liable between themselves and Lowrey's firm to take up the notes, and such a liability arises on contract and constitutes a debt based on such contract, although not payable till the maturity of the notes Such a debt was provable under the Revised Statutes of the United States, title Bankruptcy, §§5067-5071.

Third Point. The fact that this debt was created by the fraud of Peter O. Strang, if the verdict of the jury on the charge of the Court requires that to be assumed as a fact in this Court, does not bring the case within the exception contained in the certificates of the discharge of the Hollands. Such a fraud might prevent the discharge of Strang, without affecting that of his partners. Section 5118 contemplates that a discharge may release one from a debt while another person liable for the same debt with the bankrupt as partner or joint-contractor, shall not be released, discharged or affected. The Hollands were discharged in bankruptcy June 1st, 1877, from all debts which existed July 3rd, 1875, their discharge was duly pleaded and proved. The Court held that there was no fraudulent intent on the part of either of the Hollands; at the close of the testimony the point was presented by a separate motion to dismiss, which was denied, and exception duly taken. The point was also presented by proper request to charge, and exceptions to the charge. The Court charged that the Hollands had no knowledge of any false representations, and were not liable criminally, but were liable civilly in this action, notwithstanding their discharge in bankruptcy, (Pp. 18, 19 and 25.) This was not a debt created by the fraud of either John B. or Joseph Holland. Fraud of the bank-

rupt's partner is not the exception of the Bankrupt Act. Section 5117, U. S. R. S. reads as follows: "No debt creat-"ed by the fraud or embezzlement of the bankrupt, or by "his defalcation as a public officer, or while acting in any "fiduciary character shall be discharged by proceedings in "bankruptcy."

This Court in Neal v. Clark, 95 U. S. R. p. 704, held that the word "fraud", as used in the thirty-third section of the bankrupt law of 1867, which provides that "no debt creat-"ted by the fraud or embezzlement of the bankrupt, or by "defalcation as a public officer, or while acting in a fiducia-"ry capacity, shall be discharged under this act," means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.

Mr. Justice Harlan, in the opinion of the court discusses the meaning of the word "fraud" as used in the thirty-third section of the bankrupt law of 1867, which provides that "no debt created by the fraud or embezzlement of the bank-"rupt shall be discharged under this act", after considering the Bankrupt Act of 1841, and the case of Chapman vs. Forsyth, 2 Howard, 202, he says of the Act of 1867: "It is "a familiar rule in the interpretation of written instruments "and statutes, that a 'passage will be best interpreted by "'reference to that which precedes and follows it.' So also "'the meaning of a word may be ascertained by reference "'to the meaning of words associated with it.' In Brooms "Legal Maxims, p. 450, it is said: 'It is a rule laid down "'by Lord Bacon, that *copulatio verborum indicat acceptationem* "'*in eodem sensu*, the coupling of words together shows that "'they are to be understood in the same sense. And where "'the meaning of any particular word is doubtful or "'obscure * * * the intention of the party who has "'made use of it, may frequently be ascertained and car-"'ried into effect by looking at the adjoining words.' The

"same author says, (p. 455). 'In the construction of "'statutes, likewise the rule *noscitur a sociis* is very frequent-"'ly applied, the meaning of a word, and consequently, the "'intention of the Legislature, being ascertained by refer-"'ence to the context, and by considering whether the "'word in question and the surrounding words are, in fact, "'*ejusdem generis*, and referable to the same subject mat-"'ter.'

"Applying these rules to this case, we remark that, in "the section of the law of 1867, which sets forth the classes "of debts which are exempted from the operation of a dis-"charge in bankruptcy, debts created by 'fraud', are associat-"ed directly with debts created by 'embezzlement'. Such "association justifies, if it does not imperatively require, "the conclusion that the 'fraud' referred to in that section "means positive fraud, or fraud in fact, involving moral "turpitude or intentional wrong, as does embezzlement, "and not implied fraud, or fraud in law, which may exist "without the imputation of bad faith or immorality. Such "a construction of the statute is consonant with equity, "and consistent with the object and intention of Congress "in enacting a general law by which the honest citizen may "be relieved from the burden of hopeless insolvency. A "different construction would be inconsistent with the "liberal spirit which pervades the entire bankrupt system.

"It results from what has been said that the debt or "claim asserted against Neal was not 'created by the "'fraud * * * of the bankrupt', within the meaning of "the thirty-third section of the law of 1867. His discharge "in bankruptcy affords him complete protection."

On the facts of this case there was no foundation for a claim of intentional wrong or moral turpitude on the part of the Hollands; their indebtedness to Lowrey's firm out of this transaction, simply resulted from their partnership with Strang, and their liability in the action was one implied by the law from such partnership, and not from any wrongful act of theirs.

Fourth Point. The Court below erred in depriving the Hollands of their rights under the Bankrupt law, and under their discharge duly obtained under the provisions of the Revised Statutes of United States.

Such error is found at the close of the testimony when defendants' counsel moved to dismiss the complaint separately on behalf of John B. Holland, and Joseph Holland, because no cause of action was made out against them which was not discharged by their discharge in bankruptcy granted June 1st, 1877, (P. 17) in the denial of the motion by the Court, and the exceptions taken duly and specifically to the denial of the separate motion in behalf of each of them. (P. 18).

Such error was repeated in the charge that partners are liable for the fraudulent acts of a copartner in the business of a partnership; so that the brothers Holland stand here with an entire absence of testimony, tending to charge them with knowledge of these false representations, and that they had no such knowledge appears by their own testimony, they are, however, responsible jointly with their copartner for the fraud, if one was perpetrated by him (p. 18-19), to which exception was duly taken (p. 25).

Such error was renewed when the Court refused to instruct the jury as to John B. Holland, and also as to Joseph Holland, as requested, that their being no claim of any fraud perpetrated by them, and no evidence of any fraud perpetrated by them, this is not a debt created by their fraud, and they are not liable in this action, but are discharged by their discharge in bankruptcy, from all liability in this action, to which exceptions were duly taken (p. 26). The questions are thus clearly presented by the record, and were decided in the State Court against the right of the plaintiffs in error, as appears not only by the record, but by the opinions below.

This decision of the Court below was contrary to the construction of the bankrupt act given by this Court.

Chapman vs. Forsyth, 2 How, U. S. R., 202.
Neal vs. Clark, 95 U. S. R., 704.
Wolf vs. Stix, 99 U. S., 1.
Hennequin vs. Clews, 111 U. S. R., 676.

In Hennequin vs. Clews, this Court in its opinion by Mr. Justice Bradley, after discussing Neal vs. Clark, where in the State Court Neal was held to be liable, not because he was guilty of any actual fraud, but because in view of the circumstances attending his purchase he had committed constructive fraud, and because "fraud" in the exception contained in the 33d section of the bankrupt act (of 1867), included both constructive and actual fraud, which was reversed by this Court, because it held that such "fraud" means positive fraud or fraud in fact, and not implied fraud or fraud in law and considering numerous other authorities in all of which some shade of misconduct, something of the character of delinquency though varying in description, is found, sustains the construction of the statute adopted by this Court in the previous cases.

Fifth Point. The distinction sought to be found by the State Court is unsound. It is no answer to the right of the plaintiffs in error to say that the claim of the defendants in error was "damages," and that "debts only are provable in bankruptcy and therefore only can be discharged in "bankruptcy," as is said by Judge Earl. The complaint in the action clearly sets forth the contract from which the liability arises. The insertion in addition of the allegations of the false representations of Strang by which the notes were obtained does not change the nature of the action, or of the liability of the parties. When the forms of actions are preserved, damages are recovered in actions in contract as well as in tort. The Massachusetts cases to which Judge Earl refers as making Hennequin vs. Clews, and Neal vs. Clark, inapplicable, are based on the technical rules applicable to such forms of actions which do not exist in New York. In

1852, the State of New York enacted what was known as the Code of Procedure, entitled, "An Act to simplify the "practice, pleadings and proceedings in the Courts of this "State" the preamble of which recites that, "Whereas, it is "expedient that the present forms of actions and pleadings "in cases at common law should be abolished ; that the dis- "tinction between legal and equitable remedies should no "longer continue, and that an uniform course of proceed- "ings, in all cases, should be established," and section 481 of the Code of Procedure in force, when this action was brought and tried enacted that "the complaint must contain "a plain and concise statement of the facts constituting each "cause of action, without unnecessary repetition.

"A demand of the judgment to which the plaintiff sup- "poses himself entitled."

Tested by this Statute an examination of the complaint shows that it states a cause of action based on contract, a debt. Bouvier says, debt means any claim for money. In a still more enlarged sense it denotes any kind of just demand, as the debts of a bankrupt 1 Bouvier L. D. 290. "Damages "are given either for breaches of contract or for tortious "acts," id. 278. When it enters into how such debt was created, it alleges that it was created by false representations constituting fraud. The proofs show that such false representations were made by Strang, without the knowledge of the Hollands. The debt therefor was created by the fraud of Strang, not by the fraud of either of the Hollands.

The pleading in this case was under the Statute of New York. The first pleading was not a declaration in tort, but a complaint setting out in full the promissory notes made and endorsed by Lowrey and Bradner, and transmitted to the defendants at their request and for their accommodation which the defendants duly endorsed, put in circulation and had discounted and became liable to pay, but which after they were dishonored, plaintiffs took up. There was a debt

created. The representations made by Strang, by which the notes were obtained, and which made the debt one created by his fraudulent representation, does not make the debt any the less a debt, but it leaves the debt which arose from the acts of the parties alleged in the words of the statute "a "debt created by fraud."

So far as either of the Hollands are concerned it is not a debt created by the fraud of the bankrupt.

The authority of Neal vs. Clark and Hennequin vs. Clews required the dismissal of the complaint as to the Hollands, or a charge that they were freed by the bankrupt act from liability in this action.

There was neither an intentional nor an affirmative fraudulent act of either of the Hollands. There was no active or express fraud on their part. The attempt is to charge them by implication for the acts of another; this is clearly forbidden.

There was no claim of any intentional wrong or moral turpitude of either of the Hollands, but the fraud for which the Court held them was one implied to them by reason of the partnership relation.

Seventh Point. For the errors assigned the judgment should be reversed.

GEORGE H. FORSTER,
Of Counsel for Plaintiffs in error.

114-555

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

NO. 246.

JOHN B. HOLLAND and JOSEPH HOLLAND, Survivors, &c.,
Plaintiffs in error.

vs.

AMARIAH H. BRADNER and DANIEL LOWERY,
Defendants in error.

Additional Brief for Plaintiffs in error.

GEORGE H. FORSTER,
of Counsel for Plaintiffs in error.
No. 58 Wall St., New York City.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1884.

JOHN B. HOLLAND and JOSEPH HOLLAND, Survivors, &c. Plaintiffs in Error, against AMARIAH H. BRADNER and another, Defendants in Error.	No. 246.

Additional Brief for Plaintiffs in Error.

The debt sued on in this case was provable under §§ 5067–5069 of the Revised Statutes. In re Eureka Man. Co., Lowell 500. In re Randle 2, B. R. 113. In re Frear, 2 Benedict, 467. Sigimund *vs.* Willis 3, B. R. 207. In re Louis H. Rosey 8, B. R. 509. Cole *vs.* Roach 10, B. R. 288. Barnes *vs.* U. S. 21, J. R. R, 212. In re Morse & Co. 11, B. R. 482. Boyd *vs.* Vanderkemp, 1 Barbour ch. 273. It was not the procuring of the notes by the false representations of Strang which made the Hollands liable to Lowrey &

Bradner for the amount which Lowrey & Bradner paid to take up the notes, because had Strang after so procuring the notes kept them himself or put them in the firm's safe, Lowrey & Bradner would have sustained no damage, and would have had only a cause of action to recover from Strang or his firm the possession of the notes on the ground that Strang had procured them by fraud. It was the endorsement of the notes by Strang & Holland Brothers and their putting them in circulation and procuring them to be discounted after they had been *made for their accommodation* which give rise to the debt sued on. The third paragraph of the complaint sets out with the allegation that the notes were made "*at the request of Strang & Holland Bros. and for "their accommodation*," p. 31, andthen follows after a description of the notes the allegation that Strang & Holland Bros. "*duly endorsed the notes, put them in circulation by procuring "them to be discounted and obtained the money thereon and thereby "became liable to pay them*," p. 32. This stamps the obligation as a debt.

There is an essential difference between this cause of action and libel, slander or assault and battery to which it is declared analagous by Judge Earl in the opinion of the State Court p. 87; demands arising from injuries strictly personal (whether arising from tort or contract) are not assignable,do not survive to the personal representatives,are not probable in bankruptcy and consequently are not discharged by a bankruptcy discharge but all others are. Zalnohie *vs* Smith 3, Kernan, 333. McKees *vs.* Judd 2, Kern, 625. Quinn *vs.* Moore, 15 N. Y., 435.

That the complaint herein is for a cause of action which is provable in bankruptcy and dischargeable under a bankruptcy discharge,is clear from an examination of the pleadings when as here the bankrupts who claim the benefit of the discharge were not guilty of the fraud by which the debt was contracted. Record, pages 31, 39, 46.

When Strang & Holland Brothers sold the notes to the purchaser thereof they thereby wrongfully converted them to their own use, and by § 5067 of the R. S., the demand against them for such notes wrongfully converted may be proved and allowed as debts to the amount of their value, with interest. Strang & Holland Brothers never did any act with regard to such notes after their conversion, and the act of Lowrey & Bradner in taking up the notes, does not operate so as to change the transaction from a debt provable in bankruptcy to one that is not.

If this be not so then the lawful owner of any goods or chattels wrongfully converted by one who after such conversion becomes bankrupt by repurchasing his goods and chattels from the holder of the same, could transfer his demand against the bankrupt from one which would be discharged in bankruptcy to one which would be exempt from the operation of a discharge.

The civil remedies of the owner of goods or chattels wrongfully taken or converted, are provable under § 5067, and are discharged by a bankruptcy discharge, except so far as they may be regarded as debts contracted by the fraud of a bankrupt.

The Court of Appeals of the State of New York have expressly held repeatedly that a complaint in form like this does not make the action one in tort.

In Boxlir vs. Wood, 24 N. Y., 607, that court held that a complaint under the Code which stated fraudulent representations of the defendant by which the plaintiff was induced to pay him money, which he seeks to recover back, does not stamp the action as one in tort, or show that the cause of action is not assignable before judgment as it would be if it were in tort.

In Neftel vs. Lightstone, 77 N. Y.96, Judge Earl, in delivering the opinion of the Court, says: "The defendant was

" a real estate broker in the City of New York, and in June,
" 1870, the plaintiff negotiated with him for the purchase of
" a house. The complaint alleges that upon the representa-
" tion of the defendant that it was necessary for the plaintiff,
" in order to secure the house, to deposit with him $1,500,
" he did place in defendant's hands two cheques for that sum,
" upon the agreement by him that he would return the same
" to the plaintiff, if he (the plaintiff) afterward, upon inquiry
" concerning the house, concluded not to purchase the same ;
" that the plaintiff did afterward upon inquiry conclude not
" to purchase the house, and then demanded of him the return
" of the cheques ; that the defendant refused to return them,
" but wrongfully converted them to his use, by collecting
" and causing to be collected the money upon them. The
" complaint also alleges that certain representations made by
" the defendant concerning the house were known by him to
" be false, and 'that he made them for the wrongful and
" 'fraudulent purpose of inducing the plaintiff to part with
" 'his said money and of converting wrongfully the same as
" 'aforesaid to his own use.' And the prayer for judgment
" is as follows : 'Wherefore the plaintiff demands judgment
" 'against the defendant for the wrong and injury aforesaid,
" 'and that the defendant be adjudged and pay him damages
" 'to the amount of $1,500, with interest,' etc. Upon the
" trial, the plaintiff did not prove any fraud, and the de-
" fendant, on that account, claiming that the cause of action
" alleged was one for fraud and deceit, moved that the com-
" plaint be dismissed. The Judge denied the motion, holding
" that the complaint was upon contract, and submitted the
" case to the jury, upon the conflicting evidence as to the
" contract. The appellant now claims that the Judge
" erred ; that he should have held that the complaint was for
" fraud, and not for breach of contract, and should have non-
" suited the plaintiff. While the complaint is unnecessarily
" prolix, and contains allegations not needful for a cause of
action for the fraud or upon contract, yet it contains all

" the allegations requisite for a complete statement of a cause " of action upon the contract to hold and return the " cheques."

In Sparman *vs.* Keim, 83 N. Y., 245. "Plaintiff's com- "plaint alleged in substance that he is an infant ; that induced "by false and exaggerated representations of the defendant "as to the profitable nature of his business, to wit, ' that it " 'would yield large profits,' he was induced to become a part- "ner, and invested $1,000 therein ; that becoming satisfied "of the falsity of the representations, he demanded his "money back, which was refused, and he asked judgment "for the amount. The only representation proved on the "trial was ' that it was a good paying business.' The plain- "tiff was non-suited on the trial, on the ground that the "cause of action stated in the complaint was in tort. Held "error ; that the allegation of the complaint made a good "cause of action on contract, as the agreement of partner- "ship was one an infant could avoid, and having done so, "plaintiff was entitled to recover back his money, less what "he had received from the partnership "

On page 250, the Court, per Finch, J., say : "He, there- "fore, both alleged and proved a good cause of action on "contract. That there were allegations of fraudulent repre- "sentations in the complaint does not of necessity fix the "character of the action,"

In Conaughty *vs.* Nichols, 42 N. Y. 83, it was held that "A "complaint containing a statement of facts constituting a "cause of action on contract, sustained by proof of such "facts upon the trial, authorizes a recovery, although the "complaint is in form for a conversion, and the summons in "the action is for relief."

In Ledwich *vs.* McKim, *et al.*, 53 N. Y., 307, it was decided that "where the summons in an action is for money, and the "complaint sets forth facts which make out a cause of action

"ex contractu, the presence of averments of fraud in the "complaint does not make the action one ex delicto."

At page 316, the Court, per Folger, J., say: "It is true "that the complaint avers that the defendants represented "these instruments to be bonds of the railroad corporation, "issued by and binding upon it, and that the plaintiff's as- "signor relied upon these representations. But the sum- "mons is not for relief. It is for money. The complaint "avers the facts which were proven and which make out a "cause of action in contract. The presence of the averment "as to the representations, even were they averred to have "been false and fraudulent, do not make the action one ex "delicto."

In Greentree *vs.* Rosenstock, 61 N. Y., 583, the Commission of Appeals held that "Where a complaint sets forth "facts constituting a cause of action, ex contractu, an alle- "gation therein of an incorrect legal conclusion, having the "aspect of a tort, does not change the nature of the action."

"Plaintiff's complaint alleged, in substance, that defend- "ant received certain sums in gold coin, the proceeds of "sales and of collections made by him as agent for plain- "tiff's assignor; that defendant failed to account to his "employer for the gold coin, or its proceeds, but converted "the same to his own use, and refused, upon demand made "by plaintiff, after the assignment made to him, to pay over "said gold coin or its proceeds, and asked judgment for the "damages.

"Held, that the action was for breach of contract (i. e., a "failure to account and pay over as agent), not one in tort; "that the allegation of conversion was merely surplusage."

On page 588, Dwight, C. says: "On the appeal from the "judgment, the defendant claims that the referee should "have dismissed the complaint, on the ground that, as the "summons is for relief, and, according to his view, the action

"is in tort for the conversion of gold, and the claim is for "$10,000 damages, consequent on the tort, the plaintiff can-"not recover on contract merely for a debt due. I do not "think that the present action is framed in tort."

In Neal *vs.* Clark, and Wolf *vs.* Stix, the actions were in Equity, but the principle then decided is applicable to this case.

Henniquin *vs.* Clews was an action commenced in a New York Court, under the same Code as is applicable to the present case.

The point taken by the counsel for the defendants in error that the discharges of the Hollands do not affect their liability for firms debt is contrary to the statute, and the authorities construing the same.

The judgment should be reversed.

GEORGE H. FORSTER,
Of Counsel for Plaintiffs in error.

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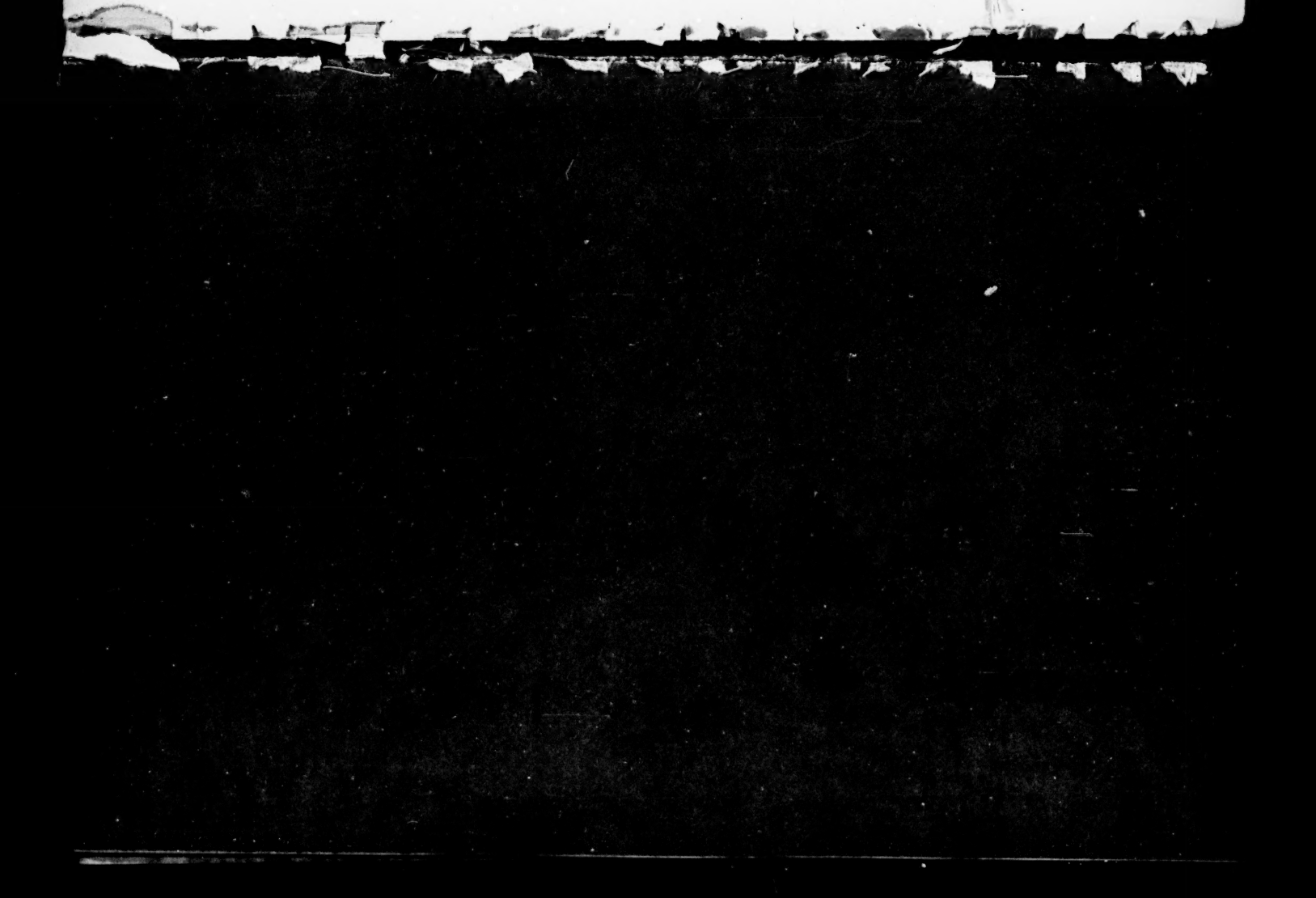
Supreme Court of the United States.

OCTOBER TERM, 1884.

JOHN B. HOLLAND AND JOSEPH HOLLAND, SURVIVORS, &C.,
Plaintiffs in Error,
against
AMARIAH H. BRADNER AND ANOTHER,
Defendants in Error.
No. 246.

BRIEF FOR DEFENDANTS IN ERROR.

WILLIAM F. COGSWELL,
Of Counsel for Def'ts in Error,
ROCHESTER, N.Y.



Supreme Court of the United States.

October Term, 1884. No. 246.

JOHN. B. HOLLAND AND JOSEPH HOLLAND,
SURVIVORS, &C.,
Plaintiffs in Error.

against

AMARIAH H. BRADNER AND ANOTHER,
Defendants in Error.

Brief for Defendants in Error.

The federal question in this case is single and simple. It is whether the discharge in bankruptcy of the plaintiffs in error was a bar to the action of the defendants in error.

The action, stated in its simplest form, was for obtaining the property of the plaintiff below by false pretences. More in detail it was this: Lowrey and Bradner, the plaintiffs, below, had given to Strang & Holland Brothers, defendants, below, four promissory notes dated February 1st, 9th, 15th and 20th, 1875, respectively, for four thousand three hundred and odd dollars each. These notes were received by Strang & Holland Brothers, endorsed and negotiated by them prior to the 27th day of March, 1875, and Lowrey & Bradner were obliged to, and did take up the same; some of them by suit thereon; one without. (See notes on page 5 of the Record.) Strang & Holland Brothers procured from Lowrey & Bradner, four other notes, dated respectively March 13th, 14th,

16th and 20th, for nearly five thousand dollars each, (See Record, page 3,) upon the false and fraudulent representation that the first mentioned notes had not been used by them and that they could not use the same for the reasons specified in two letters written by Strang to Lowrey & Bradner, one dated March 27th, 1875, and the other dated April 2d, 1875. (The letters are Exhibits 2 and 3, pages 50 and 51 of the Record). The notes, which were ante-dated, procured by these fraudulent representations were also sold by Strang & Holland Brothers, or discounted at Bank, and Lowry & Bradner were compelled to take up the same. The case is well stated by the Judge at the trial in his charge to the jury. (See the charge, beginning at page 18 of the Record).

It appeared in evidence, was conceded by the plaintiff's counsel, and assumed by the judge in his charge, that the Messrs. Holland had no active participation in these fraudulent misrepresentations. It appeared with equal distinctness that the proceeds of the notes thus obtained went into the business of the firm of Strang & Holland Brothers.

The Hollands were discharged in bankruptcy on the first day of June, 1877, of the debts and claims against them provable under the bankrupt law as of the 3rd day of July, 1875. (See Discharges, page 37 of the Record). The sole question is whether such discharges were a bar to the action for the defendants Hollands. (As to Strang, of course it could not be claimed that his discharge was a bar, and as he has died since the suing out of the writ of error, his case is not before the Court).

I submit that the discharges were no bar and that it is only by confusing dissimilar things that it can be claimed that they were.

The counsel for the plaintiff in error, has throughout his Brief, assumed that this was in some way an action upon contract and that the plaintiff was seeking to hold the defendants Hollands liable and to defeat the effect of their discharges by claiming that the contract was created by fraud. It is not any such thing, and such has not been the position of the plaintiff from the beginning Such is not the cause of action stated in the complaint; such was not the action tried in the Circuit Court of the State; such was not the case decided by the Court of Appeals. The action was a simple action of tort properly definable as an action on the case for damages sustained by the false pretences of the defendants. If, by this fraud, Strang & Holland Brothers had procured from Lowrey & Bradner, government bonds of an equal value with their promissory notes or personal property of like value, there would be no room for the defendants' contention. It, of course, makes no difference with the question of law involved in the case whether they obtained of Lowrey & Bradners securities executed by others, belonging to them, or property belonging to them, or their money, or their promissory notes by which they were eventually compelled to pay their money. There is not any element of contract or debt in the case, whatever, and, of course, no question of a debt created by fraud.

The Hollands, although personally innocent of the fraud of their partner, are liable civilly therefor, in their property and their persons. An execution might be issued upon the judgment recovered in this action against their persons and they imprisoned thereon. This law is elementary and will be found in all the treatises. In Mr. Justice Lindsley's work on

Partnership, Ewell's Edition, Volume I, (star paging 302, *et passim*), will be found some very severe applications of this doctrine. Indeed, it is a fundamental principle that innocent partners are liable *civiliter* for the frauds of their partner, to the same extent as if they had actively participated therein. Their liability stops at and only at the point where the criminal law takes cognizance of the transactions.*

As I view the case the question whether when a debt is contracted by fraud by a partnership through the instrumentality of one partner, a discharge in bankruptcy of the others, who have had no active participation in this fraud, will discharge such debt does not arise upon this record. It is probably improper to discuss it. When it does arise it will be found that very much may be said in favor of the negative. The partnership is the contracting party, the fraud is the fraud of the partnership. By the intimate relation existing between its constituents the act of one is the act of all and of each. It would be exceedingly difficult and embarrassing if the defrauded creditor was compelled to unravel the transactions of the partnership and fasten guilty knowledge upon each partner he sought to hold liable. The analogies of the law are all the other way. Each partner is liable *civiliter* for the torts committed by one partner in the business of the firm. If one partner of a publishing firm publishes a libel each partner is liable therefor. Many other illustrations might be cited of the torts of the partnership where each is liable for the acts of one and which liability would not be affected by a discharge in bankruptcy. Why should a debt contracted by the fraud of the firm perpetrated by one member be made an

* *Coman vs. Reese, 21 Howard, Pr. Rep., 114; Townsend vs. Bogart, 11 Abb. Rep., 355; Hawkins vs. Appleby, 2 Sanford, Sup. Ct. Reps., 421; Locke vs. Stearns, 1 Met, 560.*

exception? A practical reason has been already suggested why it should not. A firm usually acts by its individual members. Its business is carried on in departments. It is seldom that more than one member is connected with a particular transaction. The defrauded creditor seeks his remedy against the partnership and should not be put to ferret out whether all have actively participated in the fraud. The partnership is a legal entity, and its acts bind all. These suggestions properly amplified would furnish a very strong argument for the negative of the above question. I do not enlarge upon them because I do not deem the question in the case.

It is further submitted that the discharge is no bar to partnership debts. It does not purport to be. It is a discharge of the debtor from all debts and claims which may be provable against his estate. (See discharges, pages 37 and 38). These are individual discharges and do not affect the liability of the Hollands for firm obligations.

The judgment should be affirmed.

WILLIAM F. COGSWELL,
Of Counsel for Def'ts in Error.
ROCHESTER, N. Y.

114 — 662

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 219.

WILLIAM ALLING, SURVIVING PARTNER OF THE FIRM OF SAMUEL A. BELDON AND COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 3, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 219.

WILLIAM ALLING, SURVIVING PARTNER OF THE FIRM OF SAMUEL A. BELDON AND COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 I. *Petition.* *Filed July* 22, 1881.

United States Court of Claims. December Term, 1880.

THOMAS CARSON, Administrator of the Estate of Samuel A. Belden, and WILLIAM ALLING,
versus
THE UNITED STATES. } No. 12760.

To the honorable the judges of the United States Court of Claims:

The petition of Thomas Carson, a citizen of Texas, and resident of Brownsville, Texas, herein suing as administrator of the domicile of the estate of Samuel A. Belden, late of the State of Texas, deceased, and of William Alling, a citizen of Louisiana, and resident of the parish of Carroll, in said State, respectfully shows:

First. That in the years 1848, 1849, and 1850, and before and since these years, a commercial partnership existed between Samuel A. Belden and William Alling, under the firm name of Samuel A. Belding and Company, located at Brownsville, Texas, and transacting a large commercial business in that State and with the adjoining territory of Mexico.

Second. That whilst the Mexican territory was occupied in these years by the United States armies, the town Matamoras, opposite Brownsville, became temporarily a port of entry of the Government of the United States, into which goods might be imported from the United States, or from which exported into the United States, on the payment of certain duties fixed by law or military regulations.

Third. That Samuel A. Belden & Co. imported from the United
2 States into Matamoras, during the said military occupation, to wit, in the years 1848 and 1849, certain merchandise, upon which they paid duties to the U. S. authorities, amounting to a large sum of money; and afterwards, in March, 1850, all of said merchandise thus imported into Matamoras was by the Mexican government, its officers and agents, illegally impressed, seized, confiscated, and sequestered, upon the restoration of Mexican power by the treaty of Guadalupe Hidalgo, by which acts of force the said merchandise was totally lost and destroyed for your petitioners and damages inflicted on the firm of Samuel A. Belden & Company, the owners of the merchandise, in an amount over $290,000. That said commercial firm presented repeatedly to the United States Government its claim for indemnity for these damages inflicted on them by the government of Mexico, and the Government of the United States pressed the matter repeatedly upon the attention of the government of Mexico prior to 1855. And on February 10, 1855, (10 S. L., 847), Congress passed an act for the relief of the said firm of Samuel A. Belden & Co., authorizing the Secretary of the Treasury "to audit and settle an account of the duties paid by them to the officers of the U. S. charged with their collection in the city of Matamoras, Republic of Mexico, whilst that city was under the military possession of the U. S., upon merchandise except tobacco imported by them into Matamoras during that period, which, after the restor-

ation of peace between the two countries, they were deprived of, either in the form in which imported or in the proceeds of sales, by illegal seizure, confiscation, sequestration, or their forced abandonment of the same by the judicial authorities of the Mexican government, and pay the amount thus ascertained to the said Samuel A. Belden & Co. out of any money in the Treasury not otherwise appropriated, upon the execution by them of a proper and legal assignment to the United States of all their right to the amount so refunded when recovered from the government of Mexico;" and by virtue of the proceedings under this act of Congress the said Samuel A. Belden & Co. received from the United States the sum of $18,347.28, the amount of duties paid by them to the officers of the United States on merchandise other than tobacco, and executed an assignment to the United States of all their right, title, claim, and interest in and to said amount so refunded as duties as aforesaid.

3 Fourth. On July 4, 1868, (15 S. L., 679), a convention was concluded between the United States of America and the Republic of Mexico for the adjustment of claims of the respective citizens of both countries on account of the injuries to their persons and property, which claims were to be submitted to two commissioners, one to be appointed by the President of the United States and one by the government of Mexico, and in case of disagreement an umpire was to be selected to decide thereon finally and without appeal. That Samuel A. Belden & Co. presented for adjudication to this commission two claims upon the government of Mexico, viz: First. One for the sum of $24,375, the alleged value of 300 bales of tobacco seized at Saltillo, Mexico, in October, 1849, in violation of the 19th article of the treaty of Guadalupe Hidalgo, February 2, 1848. (9 S. L., 936.) Second. One for the sum of $290,309$\frac{12}{100}$, alleged to be due as indemnity for the loss of a general stock of merchandise and credits, occasioned by the seizure of the place of business in Matamoras occupied by Samuel A. Belden & Co., in March, 1850. That the said commission duly took cognizance of said claims, and on July, 19, 1871, "Ordered and awarded that the government of the Republic of Mexico pay to the United States, for and on behalf of claimants, Samuel A. Belden & Co., for two hundred and ninety-nine bales of tobacco, the sum of thirteen thousand one hundred and fifty-four dollars and fifty-six cents ($13,154$\frac{56}{100}$), with interest from the 20th of October, 1849, at six per cent. per annum; and, the further sum, for goods seized and sold under execution, and loss attending same, of ten thousand ($10,000), with interest from March 6, 1850, in the currency of the United States, making a total to July 10, 1871, of fifty-three thousand and ninety-nine dollars and twenty-five cents ($53,099.25)." Following this award and judgment, but forming no part thereof, is a reference, in the opinion of the commissioners, to the assignment in writing made by the claimants to the United States under the before-recited act of Congress of February 10, 1855; and thereupon follows these words: "Nothing in this award is to be construed as preventing the United States from retaining out of the gross sum awarded herein as due to that Government on the said assignment

the aforesaid sum of thirty-five thousand nine hundred and twenty dollars and eighty-one cents ($35,920.81), paying to Belden & Co. the balance, viz, seventeen thousand one hundred and seventy-eight dollars and forty-four cents ($17,178.44)."

4 Fifth. Now, petitioners show that this supplement or addition to the award and judgment rendered by the said commission in favor of Samuel A. Belden & Co., which, if carried out, would reduce their claim for indemnity found to be due to them from $53,099.25 to $17,178.44, is, in law and fact, no part or member of the entire single award of the $53,099.25 in favor of claimants, because the award specifies item by item the indemnity money due by Mexico to Samuel A. Belden & Co., and which amount of $53,099.25 the government of Mexico not only admits to be due and owing by it to the said Samuel A. Belden & Co., but has already paid several installments thereof to the United States as the trustee for said firm. Besides the award decided nothing as to the legal relations existing between the United States and Samuel A. Belden & Co. under act of Congress of February 10, 1855, not only because the commissioners had not the slightest jurisdiction over these relations between a citizen of the United States and his national Government, but it was a matter entirely outside of their powers as fixed by the convention. The supplement or addition was a mere notification to the Government of the United States that the particular and private act of Congress of February 10, 1855, in relief of Samuel A. Belden & Co. had been brought under the attention of the commission, and that, although Mexico would pay or have to pay to the United States the entire amount of the award without defalcation, still the United States might, if it found it just, right, good, and legal in its character as a nation to do so, make the settlement alluded to, but not otherwise. It was nowhere suggested or in anywise intimated by the joint commission that the United States should, right or wrong, insist on the set-off. Nothing in the award was to prevent such a set-off from being made, and the solution of the entire matter of set-off, compensation, or retention of the $35,920.81 was properly left by the commissioners to the legal discretion of the proper officers and departments of the Government of the United States.

Sixth. Petitioners show that the commission erred both in law and fact in finding (if they did so find) any the slightest connection between Samuel A. Belden and company's first claim for $24,375, and the act of Congress of February 10, 1855, or the assignment under it, by Samuel A. Belden & Co. to the United States. Tobacco was expressly excluded from the operation of the statute. No

5 duties on tobacco were ever refunded by the United States to Samuel A. Belden & Co.; no assignment of any such duties could be or was made to the United States. Besides the tobacco when sequestrated and impressed was at Saltillo, not at Matamoras; and as indemnity for losses sustained by Samuel A. Belden & Co. at Matamoras, the amount awarded is only $10,000, not half the amount paid for duties to the United States, if interest be added to the amount $18,347.$\frac{25}{100}$ paid by the U. S. to Samuel A. Belden & Co. on July 27, 1855, the date of the assignment—the tobacco in question

having been seized by the Mexican authorities and lost to Samuel A. Belden & Co. in October, 1849.

Seventh. That about the month of September, 1878, the United States proceeded to distribute to the claimants under the commission the first two installments received by them from Mexico, through its Department of State, which department at once assumed the ground that the award of the commission as herein above set forth was a finality in its entirety; that the right of set-off in the United States was in nowise left to the discretion, judicial or legal, of the said Department of State, but was binding on it in all its parts, decretal, recommendatory, or suggestive; and the said department declined and refused to act in any way on the application made to it by counsel learned in the law on behalf of the representatives of the claim, to examine into the legality, propriety, and equity of the alleged right of set-off, compensation, and detention by the United States of the sum of $35,920.81, awarded by the commission against Mexico and in favor of Samuel A. Belden & Co. On the contrary, the Department of State insists that only $17,178.44 is coming to the said firm and its legal representatives out of the funds received, and persists in dividing the installments of moneys received from Mexico proportionately and on that erroneous basis.

Eighth. That by the unjust and illegal action of the Department of State in striving to enforce this alleged right of set-off as above set forth, it results that the United States has now in its hands, or in all probability soon will have, the difference between the installments paid on $17,178.44 and the installments due on the gross amount awarded, say on $53,099$\frac{25}{100}$; that four or more installments upon the gross amount of the award to Samuel A. Belden & Co., to wit, on $53,099$\frac{25}{100}$, have been paid by Mexico and received by the United States, amounting to the sum of $————; and the United States have only
6 distributed and paid to the legal representatives of Samuel A. Belden & Co., the sum of $————. That it is not intended by this petition to interfere in any way with the action of the State Department so far as the portion of the award, which is admitted, is concerned—say to the amount of $17,178$\frac{44}{100}$. And petitioners now claim that there is a balance due and falling due to them by the United States, as fast as the same may be paid by Mexico to the United States, and a large portion of which has been already thus paid, amounting in the aggregate to thirty-five thousand nine hundred and twenty$\frac{81}{100}$ dollars, which on the necessarily implied contract between the Government of the United States and the firm of S. A. Belden & Co., and their successors, (trusters and trustees,) the United States are justly and legally bound to pay your petitioners.

Wherefore, the premises considered, petitioners pray judgment against the United States for thirty-five thousand nine hundred and twenty $\frac{81}{100}$ dollars, as the same may be already due and payable, amounting now to over three thousand dollars; and as other amounts may fall due hereafter by payments made by the government of

Mexico, and claimants pray for all such further relief, remedy, and process as the nature of their case will permit.

THOMAS CARSON.

DURANT & HORNOR AND
NATHANIEL WILSON,
Att'ys for Claimants.

Thomas Carson, one of the above claimants, being duly sworn, deposes and says: That he has carefully read the foregoing petition by him subscribed, and knows the contents thereof, and that all the facts therein stated are true to the best of his knowledge and belief.

THOMAS CARSON.

Sworn to and subscribed before me, this seventeenth day of June, 1881.

[SEAL.] ADOLPHUS GLAEVECKE,
Clerk of the County Court of Cameron County, Texas.

7 II. *Traverse. Filed July* 30, 1881.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Ass't Attorney General.

8 III. *Plea to the Jurisdiction. Filed November* 9, 1881.

Now come the defendants, by their Attorney General, and by leave of court, say that the claimant herein should not further have or maintain his suit against the defendants, for the reason that the claim thereby made and urged against the defendants is one of which this court has not jurisdiction.

THOMAS SIMONS,
Ass't Attorney General.

IV. *Plea of Set-off. Filed Feb.* 6, 1882.

The United States, for a further plea in this behalf, come and say that claimants, at the commencement of this suit, were and still are indebted to the United States in a large sum of money, to wit, in the sum of $50,000, for money had and received by Samuel A. Belden and William Alling for the use of the United States. In this that said Samuel A. Belden and William Alling, on the 30th April, 1850, represented to the Department of State, well knowing the

same to be false, that the Mexican authorities compelled them to leave Matamoras in March, 1850, and abandon debts due to them amounting to $164,000; whereas the fact was that they did not abandon debts to anything like that amount, and they left Mexico voluntarily, in negligence of whatever property interests they had there. Upon the representations so made to the Department of State, and by the head of that Department transmitted to Congress, the act of February 10, 1855, was enacted, and under said act,
9 upon the further misrepresentation of said Belden and Alling as to the amount of debts abandoned by them, the sum of $18,347.28 was, on the 27th July, 1855, paid to them from the Treasury of the United States, and they received the same in fraud of the United States, well knowing that they had no valid claim against the government of Mexico on account of the claim for which said money was paid to them.

And the United States plead the judgment delivered on the 19th July, 1871, by the joint commission, appointed under the treaty between the United States of America and the United Mexican States, ratified February 1, 1869, in the case of Samuel A. Belden & Co. *v.* Mexico, and the record of said proceeding as evidence of the falsity of the representations of said Samuel A. Belden and William Alling, and as evidence that the said $18,347.28 was paid to them under a mistake of fact, wherein and whereby the said Samuel A. Belden and William Alling, on the 27th July, 1855, became indebted to the United States in the sum of $18,347.28, which they have since unjustly detained, and the United States claim the same, with interest from July 27, 1855; and pray that so much of the sum of $50,000 may be set off against any amount to be recovered by claimants as will equal the amount recovered.

And the Attorney General further prays the court to find specifically that fraud was practiced by Samuel A. Belden and William Alling in the statement, proof, and establishment of part of their claim under the act of February 10, 1855, to wit, of all of said claim, except so much as was for customs duties paid by them on merchandise of the value of $10,000.

And for a further plea in this behalf, the United States come and say that the claimaints, at the commencement of this suit, were, and still are, indebted to the United States in a large sum of money, to wit, the sum of $50,000, for money had and received to the use of the United States, and being so indebted, the said claimants, in consideration thereof, before the bringing of this suit, undertook and faithfully promised the said defendants that they would pay them the said sum of money when they, the said claimants, should be thereunto afterwards requested; wherefore the defendants pray that so much of the sum of $50,000 may be set off against any amount to be recovered by claimants as will equal the amount recovered in this action.

THOMAS SIMONS,
Assistant Attorney General.

10 *Amended Petition Substituting William Alling, Surviving Partner of Belden and Co. Filed by Leave of Court May 3, 1882.*

To the honorable the judges of the United States Court of Claims:

The petition of William Alling, a citizen of the State of Louisiana, and parish of East Carroll, respectfully shows:

First. That in the years 1848, 1849, and 1850, and before and since these years, a commercial partnership existed between petitioner and Samuel A. Belden, under the firm name of Samuel A. Belden and Company, located at or near Brownsville, Texas, and transacting a large commercial business in that State and with the adjoining territory of Mexico. And that Samuel A. Belden died on or about February 12th, 1871, and petitioner is the sole surviving member of the said partnership.

Second. That whilst the Mexican territory was occupied, in these years, by the United States armies, the town Matamoras, opposite Brownsville, became temporarily a port of entry of the Gov-
11 ernment of the United States, into which goods might be imported from the United States, or from which exported into the United States, on the payment of certain duties fixed by law or military regulations.

Third. That Samuel A. Belden and Co. imported from the United States into Matamoras, during the said military occupation, to wit, in the years 1848 and 1849, certain merchandise, upon which they paid duties to the U. S. authorities amounting to a large sum of money; and afterwards, in March, 1850, all of said merchandise thus imported into Matamoras was, by the Mexican government, its officers and agents, illegally impressed, seized, confiscated, and sequestered, upon the restoration of Mexican power by the treaty of Guadalupe Hidalgo, by which acts of force the said merchandise was totally lost and destroyed for your petitioner, and damages inflicted on the firm of Samuel A. Belden and Company, the owners of the merchandise, in an amount over $290,000. That said commercial firm presented repeatedly to the United States Government its claim for indemnity for these damages inflicted on them by the government of Mexico, and the Government of the
12 United States pressed the matter repeatedly upon the attention of the government of Mexico prior to 1855. And on February 10, 1855 (10 S. L., 847), Congress passed an act for the relief of the said firm of Samuel A. Belden and Co., authorizing the Secretary of the Treasury "to audit and settle an account of the duties paid by them to the officers of the U. S. charged with their collection in the city of Matamoras, Republic of Mexico, whilst that city was under the military possession of the U. S., upon merchandise, except tobacco, imported by them into Matamoras during that period, which, after the restoration of peace between the two countries, they were deprived of, either in the form in which imported or in the proceeds of sales, by illegal seizure, confiscation, sequestration, or their forced abandonment of the same by the judicial authorities of the Mexican government, and pay the amount thus ascertained to the said Samuel A. Belden and Co. out of any money

in the Treasury not otherwise appropriated, upon the execution by them of a proper and legal assignment to the United States of all their right to the amount so refunded when recovered from the government of Mexico;" and by virtue of the proceedings
13 under this act of Congress the said Samuel A. Belden and Co. received from the United States the sum of $18,347.28, the amount of duties paid by them to the officers of the United States on merchandise other than tobacco, and executed an assignment to the United States of all their right, title, claim, and interest in and to said amount so refunded as duties as aforesaid.

Fourth. On July 4, 1868 (15 S. L., 679), a convention was concluded between the United States of America and the Republic of Mexico for the adjustment of claims of the respective citizens of both countries on account of the injuries to their persons and property, which claims were to be submitted to two commissioners, one to be appointed by the President of the United States and one by the government of Mexico, and in case of disagreement an umpire was to be selected to decide thereon finally and without appeal. That Samuel A. Belden and Co. presented for adjudication to this commission two claims upon the government of Mexico, viz: First, one for the sum of $24,375, the alleged value of 300 bales of tobacco seized at Saltillo, Mexico, in October, 1849, in violation of the 19th article of the treaty of Guadalupe Hidalgo, February 2, 1848
14 (9 S. L., 936). Second, one for the sum of $290,309.12 alleged to be due as indemnity for the loss of a general stock of merchandise and credits, occasioned by the seizure of the place of business in Matamoras occupied by Samuel A. Belden and Co. in March, 1850. That the said commission duly took cognizance of said claims, and on July 19, 1871, "ordered and awarded that the government of the Republic of Mexico pay to the United States, for and on behalf of claimants, Samuel A. Belden and Co., for two hundred and ninety-nine bales of tobacco, the sum of thirteen thousand one hundred and fifty-four dollars and fifty-six cents ($13,154.56), with interest from the 20th October, 1849, at six per cent. per annum; and the further sum for goods seized and sold under execution, and loss attending same of ten thousand ($10,000), with interest from March 6, 1850, in the currency of the United States, making a total to July 10, 1871, of fifty-three thousand and ninety-nine dollars and twenty-five cents ($53,099.25)." Following this award and judgment, but forming no part thereof, is a reference, in the opinion of the commissioners, to the assignment in writing made by the claimants to the United States under the before-
15 recited act of Congress of February 10, 1855; and thereupon follows these words: "Nothing in this award is to be construed as preventing the United States from retaining, out of the gross sum awarded herein as due to that Government on the said assignment, the aforesaid sum of thirty-five thousand nine hundred and twenty dollars and eighty-one cents ($35,920.81), paying to Belden and Co. the balance, viz., seventeen thousand one hundred and seventy-eight dollars and forty-four cents ($17,178.44)."

Fifth. Now, petitioner shows that this supplement or addition

to the award and judgment rendered by the said commission in favor of Samuel A. Belden and Co., which, if carried out, would reduce their claim for indemnity found to be due to them from $53,099.25 to $17,178.44, is, in law and fact, no part or member of the entire single award of the $53,099.25 in their favor, because the award specifies item by item the indemnity money due by Mexico to Samuel A. Belden and Co., and which amount of $53,099.25 the government of Mexico not only admits to be due and owing by it to the said Samuel A. Belden and Co., but has already paid several instalments thereof to the United States as the trustee for
16 said firm. Besides, the award decided nothing as the legal relations existing between the United States and Samuel A. Belden and Co. under act of Congress of February 10, 1855, not only because the commissioners had not the slightest jurisdiction over these relations between a citizen of the United States and his National Government, but it was a matter entirely outside of their powers as fixed by the convention. The supplement or addition was a mere notification to the Government of the United States that the particular and private act of Congress of February 10, 1855, in relief of Samuel A. Belden and Co. had been brought under the attention of the commission, and that although Mexico would pay or have to pay to the United States the entire amount of the award without defalcation, still the United States might, if it found it just, right, good, and legal in its character as a nation to do so, make the settlement alluded to, but not otherwise. It was nowhere suggested or in anywise intimated by the joint commission that the United States should, right or wrong, insist on the set-off. Nothing in the award was to prevent such a set-off from being made, and the solution of the entire matter of set-off, compensation, or retention of the $35,920.81 was properly left by the commissioners to the legal
17 discretion of the proper officers and departments of the Government of the United States.

Sixth. Petitioner shows that the commission erred both in law and fact in finding (if they did so find any) the slightest connection between Samuel A. Belden and Company's first claim for $24,375, and the act of Congress of February 10, 1855, or the assignment under it by Samuel A. Belden and Co. to the United States. Tobacco was expressly excluded from the operation of the statute. No duties on tobacco were ever refunded by the United States to Samuel A. Belden and Co.; no assignment of any such duties could be or was made to the United States. Besides the tobacco when sequestrated and impressed was at Saltillo, not at Matamoras; and as idemnity for losses sustained by Samuel A. Belden and Co. at Matamoras, the amount awarded is only $10,000, not half the amount paid for duties to the United States, if interest be added to the amount $18,347.28, paid by the United States to Samuel A. Belden and Co. on July 27, 1855, the date of the assignment, the tobacco in question having been seized by the Mexican authorities and lost to Samuel A. Belden and Co. in October, 1849.

Seventh. That about the month of September, 1878, the United

States proceeded to distribute to the claimants under the
18 commission the first two instalments received by them from Mexico, through its Department of State, which Department at once assumed the ground that the award of the commission, as hereinabove set forth, was a finality in its entirety; that the right of set-off in the United States was in no wise left to the discretion, judicial or legal, of the said Department of State, but was binding on it in all its parts, decretal, recommendatory, or suggestive; and the said Department declined and refused to act in any way on the application made to it by counsel learned in the law on behalf of the representatives of the claim to examine into the legality, propriety, and equity of the alleged right of set-off, compensation, and detention by the United States of the sum of $35,920.81, awarded by the commission against Mexico and in favor of Samuel A. Belden and Co. On the contrary, the Department of State insists that only $17,178.44 is coming to the said firm and its legal representatives out of the funds received, and persists in dividing the instalments of moneys received from Mexico proportionately, and on that erroneous basis.

Eighth. That by the unjust and illegal action of the Department of State in striving to enforce this alleged right of set-off as above set forth, it results that the United States has now in its
19 hands, or in all probability soon will have, the difference between the instalments paid on $17,178.44 and the instalments due on the gross amount awarded, say, on $53,099$\frac{25}{100}$; that four or more instalments upon the gross amount of the award to Samuel A. Belden and Co., to wit, on $53,099$\frac{25}{100}$, have been paid by Mexico and received by the United States, amounting to the sum of $——, and the United States have only distributed and paid to Samuel A. Belden and Co. the sum of $——; that it is not intended by this petition to interfere in any way with the action of the State Department, so far as the portion of the award which is admitted is concerned, say, to the amount of $17,178$\frac{44}{100}$. And petitioner now claims that there is a balance due and falling due to him by the United States as fast as the same may be paid by Mexico to the United States, and a large portion of which has been already thus paid, amounting in the aggregate to thirty-five thousand nine hundred and twenty $\frac{81}{100}$ dollars, which, on the necessarily implied contract between the Government of the United States and the firm of S. A. Belden and Co. and their successors (trusters and trustees), the United States are justly and legally bound to pay your petitioner.

20 Wherefore, the premises considered, petitioner prays judgment against the United States for thirty-five thousand nine hundred and twenty $\frac{81}{100}$ dollars, as the same may be already due and payable, amounting now to over three thousand dollars, and as other amounts may fall due hereafter by payments made by the government of Mexico; and claimant prays for all such further relief, remedy, and process as the nature of his case will permit.

DURANT AND HORNOR,
NATH'L WILSON,
Att'ys for Claimant.

William Alling, the above claimant, being duly sworn, deposes and says: That he has carefully read the foregoing petition by him subscribed, and knows the contents thereof, and that all the facts therein stated are true, to the best of his knowledge and belief.

WILLIAM ALLING.

Sworn and subscribed before me, this 6th day of April, 1882.

[SEAL.] CHAS. R. EGELLY,
Notary Public.

21 VI. *Findings of Fact and Conclusion of Law. Filed May* 8, 1882.

Findings of Fact.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

During the late war between the United States and Mexico, and while Matamoras was occupied by our troops, S. A. Belden and William Alling, under the firm name of S. A. Belden & Co., opened a store or trading establishment in that place. The business was continued until March 6, 1850, when interrupted, as hereinafter stated. During their occupancy the United States levied a duty of 30 per cent. ad valorem upon all merchandise imported into Mexico. This duty was paid by Belden & Co. upon their several importations.

II.

A treaty of peace was signed February 2, 1848, ratified and exchanged May 30, 1848, and proclaimed July 4, 1848. Article 19 stipulated that all merchandise and property imported into Mexico prior to the restoration of the custom-houses to the Mexican authorities should be exempt from confiscation, and from any charge upon the sale thereof.

III.

By the laws of Mexico the exclusive right to deal in leaf tobacco throughout the Republic was farmed out to a single company. To protect this monopoly, agents and detectives were placed in various parts of the country.

IV.

After the treaty of peace was ratified and exchanged, but before the custom-house at Matamoras was surrendered, to wit, in the month of June, 1848, a quantity of leaf tobacco was imported into Mexico at Matamoras by R. B. Kingsbury, and the duties paid to the United States. In September, 1848, Belden & Co. purchased from Kingsbury 300 bales of this tobacco. In September, 1849, Belden & Co., having first obtained permits, loaded the tobacco in wagons, and, under the care of an agent, started it inland to market.

At Saltillo, about 400 miles from Matamoras, where the wagons had been halted a few days for repairs, complaint was made
22 before the district judge (Gomez) by an agent of the monopoly that the tobacco had been illegally imported. The judge directed the tobacco to be detained, and the parties in charge of it to attend a trial. They, however, returned to Matamoras and reported the facts to their employers. Subsequently Belden & Co. were twice summoned, but, owing to the distance, shortness of time, and the apprehension that a trial would not be accorded them, failed to attend. By a decree of the court the tobacco was finally confiscated, and, in accordance with Mexican law, a fine in double its value, to wit, $26,309.12, imposed upon its owners. Subsequently an execution, with clause of *capias* for the collection of the fine, was placed in the hands of the proper officers in Matamoras, and on March 6, 1850, served upon Mr. Belden. Mr. Belden was then, as he had been from the beginning, the resident and business manager of the concern. To avoid arrest he crossed the river to Texas. Belden & Co. gave no further attention to their affairs in Mexico, but repaired to Washington and presented to the President and to the Secretary of State a claim for indemnity. The United States minister in Mexico was directed to bring the case to the attention of that government.

V.

Pending these negotiations, Belden & Co. applied to Congress for relief.

The claim presented to Congress, the same that had already been presented to the State Department, was as follows:

First.	300 bales of tobacco at the established price of the tobacco administration of Saltillo, 30,000 lbs. @ 81¼ cts	$24,375 00
Second.	Amount of fine imposed by Judge Gomez	26,309 00
Third.	For damages resulting from said seizure of tobacco and merchandise, &c., &c.	100,000 00
Fourth.	For amount of merchandise, and for debts due us now existing in Mexico, the disposal of which goods and the collection of said debts being rendered impossible, &c., &c.	164,000 00
		$314,684 12

Thereupon Congress passed the act of February 10, 1855. (10 Stat., 847.)

Belden & Co. then presented their claim to the Secretary of the Treasury under this act, and represented that they had been compelled to abandon the Matamoras goods and debts amounting to $164,000, the whole of which had since been lost.

The Secretary of the Treasury, accepting their evidence in proof of this statement, allowed them upon that basis as follows:

For amount of duties paid by Belden & Co. to the officers of the United States charged with their collection in the city of Matamoras, Mexico, whilst that city was in the military possession of the United States, upon merchandise imported by them into the city of Matamoras during that period, which, after the restoration of peace, they were deprived of by the judicial authorities of the Mexican government		$25,616 72
Deduct duty on tobacco (excepted by act)	$513 52	
Deduct duties on merchandise on which Belden & Co. realized cash	6,755 92	
		7,269 44
		$18,347 28

23 That sum was paid to Belden & Co., and the following assignment executed and delivered:

Assignment of Samuel A. Belden & Co. to the United States.

Whereas it is provided by an act of Congress, approved on the tenth day of February, A. D. 1855, entitled "An act for the relief of Sam'l A. Belden and Company," "That the Secretary of the Treasury be, and he is hereby, authorized and directed to audit and settle an account of the duties paid by Samuel A. Belden and Company to the officers of the United States charged with their collection in the city of Matamoras, in the Republic of Mexico, whilst that city was in the military possession of the United States, upon merchandise, except tobacco, imported by them into Matamoras during that period, which, after the restoration of peace between the two countries, they were deprived of, either in the form in which imported, or in the proceeds of sale, by illegal seizure, confiscation, sequestration, or their forced abandonment of the same by the judicial authorities of the Mexican government, and pay the amount thus ascertained to the said Samuel A. Belden and Company out of any money in the Treasury not otherwise appropriated, upon the execution by them of a proper and legal assignment to the United States of all their right to the amount so refunded when recovered from the government of Mexico;"

And whereas the said Secretary of the Treasury, through the proper accounting officers of the Treasury, has audited and settled the said account of Samuel A. Belden and Company, in part, to wit, for all that portion of said account in which it is satisfactorily proved that the duties were paid by said Belden and Company to the officers of the United States charged with their collection, "which, after the restoration of peace between the two countries, they were deprived of, either in the form in which imported, or in the proceeds of sale by illegal seizure, confiscation, and sequestration, or their forced abandonment of the same by the judicial authorities of the Mexican government," and has paid to the said Samuel A. Belden and Company the amount so found due to them, viz., the sum of eighteen thousand three hundred forty-seven dollars and twenty-eight cents:

Now, therefore, be it known that in consideration of the payment to us of said sum of eighteen thousand three hundred forty-seven dollars and twenty-eight cents, the receipt whereof is hereby acknowledged, we hereby assign, transfer, and set over to the United States, all our right, title, claim, and interest in and to said amount so refunded to us, so that neither we, the said Samuel A. Belden and Company, nor our heirs, assigns, or administrators, shall claim or demand any part thereof.

In witness whereof, we have hereto set our hands, this twenty-seventh day of July, A. D. 1855.

SAM'L A. BELDEN & CO.

Witness:

JNO. D. BARCLAY.

VI.

Belden & Co. again presented their claim by memorial to the United States and Mexican Commission:, sitting in Washington under the convention of July 4, 1868. It was identical in items and amount with the claim presented to the State Department and to Congress, as before stated and set forth in finding V. In their memorial they admit the payment of $18,347.28 by the United States and the assignment to them of so much of the claim. The commission made the following

Order and Award.

WEDNESDAY, *July 19th*, 1871.

SAMUEL A. BELDEN & CO. *vs.* MEXICO. } No. 131. A. D.

The umpire, Dr. Francis Lieber, having decided that claimants in this case are entitled to an award, Mr. Commissioner Wadsworth delivered the following order and award of the commission:

This case having been decided by the umpire, and his opinion returned to the commissioners, and it appearing that the claim had been promptly presented to the Mexican government by the minister of the United States resident at Mexico (Mr. Letcher), and subsequently by Mr. Conkling—

It is now ordered and awarded that the government of the Republic of Mexico pay to the United States for and on behalf of claimants, Samuel A. Belden & Co., for 299 bales of tobacco, the sum of thirteen thousand one hundred and fifty-four dollars and
24 fifty-six cents, with interest from the 20th day of October, 1849, at 6 per cent. per annum; and the further sum, for goods seized and sold under execution, and loss attending same, of ten thousand dollars, with interest from March 6th, 1850, in the currency of the United States, making a total to July 1st, 1871, of fifty-three thousand and ninety-nine dollars and twenty-five cents (*i. e.*, $53,099.25).

But as the United States paid to said Belden & Co., on the 27th of July, 1855, on account of his supposed losses, the sum of eighteen

thousand three hundred and forty-seven dollars and twenty-eight cents, and took from them an assignment in writing of their said claim (now before us), which advance, with interest after the rate allowed claimants, amounts now to the total sum of thirty-five thousand nine hundred and twenty dollars eighty-one cents (*i. e.*, $35,920.81), nothing in this award is to be construed as preventing the United States from retaining out of the gross sum awarded herein as due that Government on said assignment the aforesaid sum of thirty-five thousand nine hundred and twenty dollars and eighty-one cents, paying to Belden & Co. the balance, viz., seventeen thousand one hundred and seventy-eight dollars forty-four cents.

There is also awarded $100, costs of printing, &c., in currency.

W. H. WADSWORTH, *Am. Com'r.*
FRAN'CO G. PALACIO, *M. C.*

RANDOLPH COYLE, *Sec'y.*
J. CARLOS MEXIA, *Srio.*

VII.

This award was payable in thirteen annual instalments to the United States through the State Department. Five installments, amounting to $19,010.57, were paid prior to the commencement of this suit. This sum was divided between the United States and Belden & Co., in the proportion of their respective shares as set out in the award, to wit, to the United States, $12,843.06, and to Belden & Co., $6,167.57. In September, 1878, the attorney for Belden & Co. made application to the Hon. Wm. M. Evarts, then Secretary of State, for a hearing and readjudication as to the legality and equity of this division. Upon an examination and consideration of the case in response to the application, the Secretary decided in favor of the division as above stated.

Upon the foregoing findings of facts, the court decides, as conclusion of law, that the claimants' petition be dismissed.

VII. *Opinion of the Court.*

SCOFIELD, J., delivered the opinion of the court.

In June, 1846, S. A. Belden, the deceased partner of the claimant firm accompanied the United States army into Mexico as a sutler. Afterwards, in company with William Alling, the surviving partner and claimant in this suit, he opened a store at Matamoras, then occupied by our troops, and began trading under the firm name of S. A. Belden & Co. During the war this firm imported goods into Mexico, from time to time, upon which they paid a duty to the United States of 30 per cent. *ad valorem*. A treaty of peace was signed February 2, 1848, ratified and exchanged May 30, 1848, but not finally proclaimed till July 4, 1848. By article 19 of the treaty it was stipulated that all merchandise imported into Mexico during the military occupancy by the United States should be exempt from confiscation and charge on sale. In June, 1848, a large amount

of leaf-tobacco was imported by R. B. Kingsbury. In September following he sold 300 bales to S. A. Belden & Co. As this tobacco was brought in after the ratification of the treaty, and just before the evacuation by the United States forces, its right to exemption was much questioned. Mexico had farmed out to a single company the exclusive right to deal in leaf-tobacco, and the interests of the company were jealously watched by many agents. More than a year elapsed before Beldon & Co. could obtain the necessary permits to send their tobacco into the interior for sale. When the permits were finally secured, and the tobacco started to market, it was seized and detained at Saltillo by an order from Judge Gomez, obtained upon a complaint made by an agent of the monopoly, that the same had been illegally imported. Belden & Co. were twice summoned to appear and defend, but, under the belief that a fair hearing would not be accorded them, they neglected to respond. Smuggling, under the Mexican law, was punished by a forfeiture of the goods and a fine of double their value. A decree was finally made, confiscating the tobacco and imposing a fine of $26,309.12 upon the owners. Execution, with clause of *capias* for the collection of the fines, was served upon Belden March 6, 1850. To avoid arrest he crossed the river to Texas. The store of goods at Matamoras was levied upon and sold. Belden & Co. gave no further attention to their affairs in Mexico, but applied to the President and Congress for indemnity and relief. The President referred the matter to the minister at Mexico, and Congress passed the act of February 10, 1855. (10 Stat., 847.) Under this act Belden & Co. received $18,347.28, and executed the assignment presented in the fifth finding of facts.

The claim was again laid before the United States and Mexican Claims Commission, sitting in Washington, under the convention of July 4, 1868. After a long and most laborious consideration of the case, the commission made the order and award set out in full in the sixth finding of facts. The whole allowance on the claim was $53,099.25. The commission also found that $35,920.81 of the sum belonged to the United States by assignment, and $17,178.44 to Belden & Co. The award was payable in thirteen annual installments. Prior to the inception of this suit five installments, amounting to $19,010.57, have been paid to the Secretary of State. This sum was divided by the Secretary between the United States and Belden & Co. in the proportion of the right of each, as set out in the award, to wit, to the United States $12,843.06, and to Belden & Co. $6,167.51. Against this division the claimant protested.

He obtained a rehearing before the Hon. Wm. M. Evarts, when Secretary of State, but the Secretary indorsed the action of his predecessor. Thereupon he brought suit in this court, and now claims that neither the commission nor the Secretary had authority to act in the premises. Granting that claimant's rights are not concluded by these decisions, it must be conceded that an opinion, arrived at by gentlemen distinguished not only by their high position, but by their ability and probity, entirely disinterested and under the neces-

sity of making a full examination of the facts and the law of the case, is certainly entitled to great consideration.

Going behind the judgment of the commission and the Secretary, we come to the act of Congress under which a part of this claim was assigned to the Government. That act directs the Secretary of the Treasury: First. "To ascertain the amount of duties paid by Belden & Co. upon merchandise," of which "merchandise or the proceeds of sale" they had been deprived by the wrongful act of Mexico. Second. To pay or refund the "amount thus ascertained" to Belden & Co. Third. To make an "assignment of all their right to the amount so refunded, when recovered from the government of Mexico."

Belden & Co. represented their loss to be more than $300,000. Congress acted upon that representation. It was doubtless their intention to share that loss to the extent of the duties paid upon the lost property.

If thereafter the value of the lost property should be recovered
26 from Mexico, Belden & Co. could have no claim for indemnity or charity upon their own Government. In that event they were to pay back the amount refunded, and to secure the repayment by making "legal assignment to the United States of all their right to the amount so refunded when recovered from the government of Mexico." When what was to be recovered from Mexico? Duties paid to the United States? Certainly not. They had no such item in their claim. The claim was for the value of property taken, not the items which entered into the original cost. It cannot be supposed that Congress expected Mexico to settle by taking the cost of goods in New York, adding transportation, insurance, duties paid the United States, interest or investment, and a percentage for profit. They, of course, understood that the value of the property in the market of Matamoras, not what it might have cost Belden & Co. to place it there, would be the measure of damages. There is some awkwardness in the language of the act, occasioned by the necessity of describing at considerable length the mode in which the amount of duties to be refunded to Belden & Co. should be ascertained. But when ascertained and paid they were required to assign an amount of their claim equal to the "amount so refunded." To limit the assignment to a claim for duties paid to the United States would be absurd. If it covered nothing more than that, it would be entirely worthless and meaningless; for they never had, and never could have, such a claim. With some reason the law might have limited the assignment to the claim for goods in Matamoras, or for tobacco at Saltillo, or for debts due them in Mexico (for all these were items in the claim), but it did not. It only fixed the amount to be assigned, and thus made it a lien, not upon any particular item of the claim, but upon any sum recovered.

But it is said that the assignment should at least be limited to damages recovered for merchandise which was lost, either "in the form in which it was imported or in the proceeds of sale." This language is employed in the law, as before stated, to fix the amount of duties to be refunded, not the security to be given for repayment. But, conceding the construction claimed, was not the tobacco a part

114-562

In the Supreme Court of the United States.

No. 219.—October Term, 1884.

WILLIAM ALLING, &c.,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

Brief for Appellant.

The lower court found the facts to be:

First. During the late war between the United States and Mexico, and while Matamoras was occupied by our troops, S. A. Belden & William Alling, under the firm-name of S. A. Belden & Co. opened a store or trading establishment in that place. The business was continued until March 6, 1850, when interrupted, as hereinafter stated. During their occupancy the United States levied a duty of 30 per cent. *ad valorem* upon all merchandise imported into Mexico. This duty was paid by Belden & Co. upon their several importations.

Second. A treaty of peace was signed February 2, 1848, ratified and exchanged May 30, 1848, and proclaimed July 4, 1848. Article 19 stipulated that all merchandise and property imported into Mexico prior to the restoration of the custom-houses to the Mexican authorities should be exempt from confiscation and from any charge upon the sale thereof.

Third. By the laws of Mexico the exclusive right to deal in leaf-tobacco throughout the Republic was farmed out to a single company. To protect this monopoly agents and detectives were placed in various parts of the country.

Fourth. [Gives the details of the seizure of the tobacco at Saltillo.]

Fifth. Pending these negotiations [between U. S. and Mexico] Belden & Co. applied to Congress for relief.

The claim presented to Congress, the same that had already been presented to the State Department, was as follows:

(*a*) 300 bales tobacco at the established price of the tobacco administration of Saltillo, 30,000 lbs., at 81¼	$24,375
(*b*) Amount of fine imposed by Judge Gomez .	26,309
(*c*) For damages resulting from said seizure of tobacco, merchandise, &c., &c.	100,000
(*d*) For amount of merchandise, and for debts due us now existing in Mexico, the disposal of which goods and the collection of said debts being rendered impossible, &c. . . .	164,000
	$314,684

Thereupon Congress passed the act of February 10, 1855, (10 Stat. 847.) Belden & Co. then presented their claim to the Secretary of the Treasury under this act, and represented that they had been compelled to abandon the Matamoras goods and debts, amounting to $164,000, the whole of which had since been lost.

The Secretary of the Treasury, accepting their evidence in proof of this statement, allowed them upon that basis as follows:

For amount of duties paid by Belden & Co. to the officers of the United States charged with their collection in the city of Matamoras, Mexico, whilst that city was in the military possession of the United States, upon merchandise imported by them into

the city of Matamoras during that period, which after the restoration of peace they were deprived of by the judicial authorities of the Mexican Government		$25,616 72
Deduct duty on tobacco (excepted by act)	$513 52	
Deduct duties on merchandise on which Belden & Co. realized cash .	6,755 92	
		7,269 44
		$18,347 28

That sum was paid to Belden & Co. and the following assignment executed and delivered, (Record, p. 13:)

Sixth. Belden & Co. again presented their claim by memorial to the U. S. and Mexican Commission, sitting in Washington under the Convention of July 4, 1868. It was identical in items and amount with the claim presented to the State Department and Congress, as before stated, and set forth in Finding Five. In their memorial they admit the payment of $18,347.28 by the United States and the assignment of them to so much of the claim. The Commission made the following order and award, Wednesday, July 19, 1871:

The Umpire, Dr. Francis Lieber, having decided that claimants in this case are entitled to an award, Mr. Commissioner Wadsworth delivered the following order and award of the Commission:

This case having been decided by the Umpire and his opinion returned to the Commissioners, and it appearing that the claim had been promptly presented to the Mexican Government by the Minister of the United States resident in Mexico (Mr. Letcher) and subsequently by Mr. Conkling—

It is now ordered and awarded that the Government of the Republic of Mexico pay to the United States for and

on account of claimants, Samuel A. Belden & Co., for 299 bales of tobacco the sum of $13,154.56, with interest, from October 20, 1849, at six per cent. per annum; and the further sum for goods seized and sold under execution, and loss attending the same of $10,000, with interest from March 6, 1850, in the currency of the U. S., making a total to July 1, 1871, of $53,099.25.

But as the United States paid to said Belden & Co. on July 27, 1855, on account of his supposed losses the sum of $18,347.28, and took from them an assignment in writing of their said claim (now before us), which advance, with interest at the rate allowed claimants, amounts now to the total sum of $35,920.81, nothing in this award is to be construed as preventing the United States from retaining out of the gross sum awarded herein as due that Government on said assignment the aforesaid sum of $35,920.81, paying to Belden & Co. the balance, viz., $17,178.44. There is also awarded $100, costs of printing, &c., in currency.

W. H. WADSWORTH, *Am. Com'r.*
FRAN'CO G. PALACIO, *M. C.*

Seventh. This award was payable in thirteen annual instalments to the United States through the State Department. Five instalments, amounting to $19,010.57, were paid prior to the commencement of this suit. This sum was divided between the United States and Belden & Co. in the proportion of their respective shares as set out in the award, to wit, to the United States $12,843.06 and to Belden & Co. $6,167 57. In September, 1878, the attorney for Belden & Co. made application to the Hon. William M. Evarts, then Secretary of State, for a hearing and readjudication as to the legality and equity of this division. Upon an examination and consideration of the case in response to the application, the Secretary decided in favor of the division above stated.

Assignment of Errors.

1st. The court below erred in dismissing plaintiff's petition.

2nd. And in sustaining the defendant's set-off, either partially or wholly, either for interest or principal.

3rd. And in not granting the relief prayed for in full.

Argument.

I.

This action is based on an implied promise of the United States. For them there was a consideration—the receipt of the money charged with a duty to pay it over, and the claimant had a lawful right to it when it was received.

Kuote *vs.* U. S., 95 U. S., 156.

U. S. *vs.* Lawton, 110 U. S., 150.

Preamble, 15 Stat., 679; 20 Stat., 144, Sec. 1.

The set-off involved herein grows not out of, is in no wise connected with or dependent on any treaty stipulation under R. S. 1066; but it does grow out of and is dependent on the act of Congress, (10 Stats., 847.)

Exparte Atocha, 17 Wall., 144.

Vigo's Case, 21 Wall., 648.

II.

The case is one *sui generis* in this: the United States occupy the duplicate position of trustee for creditors and of having an interest of their own to protect. This feature of the case is very uncommon, and adds greatly to its importance. These international conventions under the treaty power of the Constitution, give rise to an increasing number of cases at law and in equity. The world has discovered that there are better ways of settling disputes about money

than going to war. Nothing more denotes the progressive and pacific spirit of the age, than the extension and multiplication of these conventions.

III.

Carefully bearing in mind this interest of the United States in Belden & Co.'s claim on Mexico, not the slightest ground exists for attributing any *judicial* action whatever either to Wadsworth or Palacio, the two Commissioners who signed the award on Record, p. 15, in regard to the legal relations existing between the United States and Belden & Co. growing out of the act of Congress of February 10, 1855, (10 Stat., 847,) *á multo fortiori* to the Umpire Lieber.

Freval *vs.* Bache, 14 Peters, 95.
Leonard *vs.* Nye, 125 Mass., 458.

All that is said on this matter in the award, if not regarded as merely submissive, advisory, recommendatory, contingent and conditional, is entirely irrelevant, arbitrary, and *coram non judice*. If this portion of the award be made the basis of the judgment appealed from, a far greater wrong will be done to the Commissioners and the Umpire than to the appellants. For then the position of Wadsworth as representative of the conflicting interests of the U. S. and Belden & Co., and that of Palacio taking part in this conflict, and Belden & Co. having had no day in court, would present a spectacle for ridical surprise and amazement.

The injustice would be still greater to the Secretary of State. As the award stands, he could not touch, taste, or handle it without a violation of the act of Congress June 18, 1878, (20 Stat., 144.)

"The department refused to examine the equities of the parties or look beyond the act of Congress."

Milnor *vs.* Metz, 16 Peters, 225.

The sections 1 and 4 are mandatory on him to "first de "duct and retain or make reservation of such sums of money, "if any, as may be due to the United States," and then "the proportionate amount of any award, of which by its "terms the United States is entitled to retain a part, shall "be deducted from the payment to be made on such "award, and *shall be paid into the Treasury* of the United "States as a part of the *unappropriated money in the Treas-* "*ury.*" In the very many controversies arising among claimants under awards of international commissions, the Secretary of State sedulously holds his hand. His language always is:

"Gentlemen, go to court and bring me its decree settling "your differences, and I will pay the person entitled."

If this were not so; if he could pay whom he pleased, he would impair the jurisdiction of the Supreme Court of D. C. in its most vital part—the right to mandamus or enjoin the heads of the Executive Departments of the Federal Government.

The respective rights of the United States and Belden & Co. in the award against Mexico for $53,099.25 have, therefore, never been determined judicially by either of the Commissioners or the Umpire or the Secretary. They were all alike strangers to the legal relations between the Government and the claimants. They were "under no necessity" of making a full examination of the facts and the law of the case, and even if they did *decide* it, which is utterly denied, the reasons for disregarding their decision are most rigorous and imperative; *e. g.*, will the United States permit a Mexican commissioner to pass definitively upon their rights and duties towards their own citizens?

We therefore recognize as law all that portion of the award giving to Belden & Co. the value of 299 bales tobacco, and of goods seized and sold, say $53,099.25, but

deny the validity and conclusiveness of the remaining portion of the award, if it gives, as is contended, a judgment in favor of the United States and against Belden & Co. for $35,920.81. All that portion of the award beginning "*But as the U. S.,*" *etc.*, and ending "*the balance, viz.,* $17,178.44," is, as an award, a mere *brutum fulmen* and void.

Ridgway *vs.* Hays, 5 Cranch., Ct. Ct., 23.
Comegys *vs.* Vasse, 1 Pet., 193–212.
Sheppard *vs.* Taylor, 5 Pet., 685.
Phelps *vs.* McDonald, 99 U. S., 307.

IV.

If the Court has jurisdiction, and if the appendix to the award be not *res judicata*, we then urge that if Belden & Co. really owe the U. S. $18,347.28 principal, *still they owe no interest thereon.*

(*a*) Not a word is said about interest, either in the private act for the relief of Belden & Co., (10 Stat., 847, Feb. 10, 1855) or in their assignment to the United States. No agreement to pay interest is either expressed or implied, and none is shown or found by the Court. No *conventional* interest, therefore, can be either legally or equitably claimed, because Belden & Co. could not by any possibility be in default for non-payment of the principal.

U. S. *vs.* Denvir, 106 U. S., 536.

For the plain meaning of the act for their *relief* excludes by its very terms the idea of any personal responsibility being reserved by the United States as to Belden & Co.; *i. e.*, had the Commission adopted Palacio's views and rejected the claim altogether the United States would have no claim whatever upon Belden & Co. The United States took the assignment in full payment of the relief they granted. The United States were fulfilling a moral obli-

gation. Morally they were debtors, not creditors for the duties they had collected.

Worsley *vs.* Municipality, 9 Rob., (La.,) 324.

Catholic Society *vs.* New Orleans, 10 La. An., 73.

By the very terms of the act the right of Belden & Co. "to the amount so refunded, *when* recovered from the government of Mexico," was assigned to the United States. The right of the United States only accrued when Mexico paid the money. Nothing was more remote from the intention of the parties than a *loan on interest*.

(*b*) If the transaction be regarded as an equitable assignment of a portion of Belden & Co's. claim on Mexico, to secure an advance of $18,347.28 made by the United States, it was not of a present, but of an *expectant* interest. No violation of this contract is alleged. Belden & Co. have never been put *in mora*. The assignment cannot be regarded more strictly than that of a promissory note, which bears no interest from date till maturity, unless so expressed. Before the interest here claimed by the United States can be allowed, your Honors must find either an express contract to pay interest or a statute authorizing its imposition.

In re Gosman, L. R., 17 ch. D., 771.

Lincoln *vs.* Claflin, 7 Wall., 132–139.

(*c*) By entering into the convention with Mexico, and sueing to recover Belden & Co.'s claim, the United States, even assuming that they ever had any legal or equitable claim on Belden & Co. for the sum "paid" them (which is denied) *novated* the original indebtedness, and made the claim *their own* to the extent of the sum paid by them to Belden & Co.

(*d*) Advancements to children bear no interest. We are all sons of our own time and country. Degrees of morality in family law differ from those in property law.

1 Savigny Roman Law, sec. 56.

In re Rees., L. R., 17, ch. D., 701.

(*e*) "Give a thing and take again." "*Donner et retenir ne vaut.*" *Nos itaque dicimus quod pueri solent, quo recte data sunt eripi non licet.*

V.

The private act of Congress was for the *relief* of Belden & Co., and should not, therefore, be construed into a *burden*.

Ames *vs.* Kansas, 111 U. S., 464.

If the amount advanced them be regarded as a *loan for use*, the law presumes it made gratuitously, and this is of the very essence of the contract. "The obligation which results from a loan of money can never be more than the numerical sum mentioned in the contract." (L'a Code, 2913; Code Nap., 1895.) "And the lender cannot claim the thing lent before the time agreed on." (L'a C., 2917; C. N., 1899, 1900.) These provisions of law are based on the good faith which should reign in all contracts. Hence they are universal; and when it is said by the two commissioners that Belden & Co. must pay interest to the United States, because we have made Mexico pay interest to Belden & Co., ("which advance, with interest after the rate allowed claimants"—Rec., p. 15,) this seems quite inconclusive, and not sustainable on any correct principles of law. Belden & Co.'s cause of action against Mexico bears no resemblance to that of the United States against Belden & Co. No connection or dependence exists between them.

VI.

Upon its face, the private act of Congress was for the relief of Belden & Co., and provided for "the execution by them of a proper and legal assignment of all their right to the amount so refunded when recovered from the Government of Mexico."

The various pleas of the United States are on pp. 5 and 6 of the record. 1st. A general traverse. 2d. A plea to

the jurisdiction. 3d. Plea of set-off, embracing a charge of fraud, a plea of *res judicata*, and moneys had and received.

The Court of Claims finds that Belden & Co. in their memorial admit the payment of $18,347.28 by the United States, and the assignment to them of so much of the claim.

The petition here claims the whole amount of the award, and specially avers that if any set-off was allowed by the commission it was an error both of law and fact.

The payment of $18,347.28 was made *prima facie* to Belden & Co. from the failure of the United States, after inviting them to come to Matamoras and traffick, to protect them and their property from illegal seizure, arrest, sequestration, or forced abandonment, all in strict conformity to the national duty toward every citizen. The taxes were levied under the war power of the United States, and as this protection, which altogether failed, was the only justification for the imposition of the taxes, they were properly paid back to Belden & Co. on the cessation of the war. The taxes were *duties on exports* from the United States, not *duties on imports* into the United States, as in Fleming *vs.* Page, 9 Howard, 603; Cross *vs.* Harrison, 16 Howard, 164. If they be regarded as a military tax to support the war, or in any other legal light, the propriety of the repayment cannot be questioned.

Tested by these principles, the only legal view that can be taken of the assignment is, we submit, to construe it strictly and confine it to the taxes recovered by Belden & Co. from Mexico, and to these only.

The duty of the United States to protect Belden & Co. was not intermittent, but continuous. That the Federal Government should go on and collect by all means in its power the indemnity due to Belden & Co. by Mexico was a duty of perpetual obligation. But this duty could not be the cause of any valid legal contract on the part of Bel-

den & Co., and no other consideration is alleged or suggested.

One of the chief and most important and yet *exclusive* duties of the United States is to care for and protect the life, liberty, and property of their citizens when on the high seas or within the jurisdiction of a foreign government.

Slaughter House Cases, 16 Wall., 79.

A fortiori has the citizen the privilege of demanding this care and protection when he brings his person and property *on governmental invitation* within the territory conquered from an enemy in a public war.

VII.

This private act of Congress must be construed by the light of all the surrounding circumstances. At its date, no convention with Mexico was heard of or thought of. The United States had hardly finished paying the ten millons to Mexico under the treaty of June 30, 1854, (10 Stat., 1031); and Belden & Co. had not a single instrumentality by means of which they could recover anything from Mexico. Their claim was then an *international* matter and so remained for along time. And when the United States had succeeded in recovering by peaceful negotiation Belden & Co.'s claim, *i. e.* their entire claim for goods upon which duties had been paid to the United States, these duties so refunded were to be paid over again to the United States by Belden & Co. In other words, Belden & Co. said:

"So far as our claim for damages against Mexico in-
"volves the cost of our goods by the payment of duties to
"the United States, we assign to them our right to the
"amount of duties so refunded by the United States to us,
"*when* recovered from the government of Mexico by the
"United States."

And this, we submit, is *the true meaning* of the act for the relief of Belden & Co.

If it be not, then the following results will flow from the negative of the proposition the truth of which we affirm.

(*a*) The act will not operate to the relief of Belden & Co.

(*b*) The United States will overthrow their Secretary's account, which declares that on merchandise, except tobacco, which Mexico sequestrated and forcibly caused Belden & Co. to abandon "either in the form in which imported or in the proceeds of sales," the duties paid to the United States were $18,347.28 is utterly false, and the whole value of the goods was but ten thousand dollars.

(*c*) That out from Belden & Co.'s claim on Mexico for fine paid and tobacco sequestered, duties paid to and refunded by the United States, will be deducted from *tobacco*—an article expressly and carefully excluded by the terms of the act of Congress from its operation.

VIII.

The findings expressly show two claims of Belden & Co. upon Mexico: One for the alleged value of 300 bales *tobacco* seized at *Saltillo* and the fine imposed there by Judge Gomez. Another claim was for the loss of a *general stock* of *merchandise* and *credits*, occasioned by the seizure of Belden & Co,'s place of business in *Matamoras*. The Commissioners awarded on the first $13,154.56 with interest from October 20, 1849; and on the second, $10,000 with interest from March 6, 1850. The two causes of action were entirely distinct and independent.

On examination it plainly appears:

First. That *tobacco* was expressly excepted from the provisions and operation of the private act of February 10, 1855.

Second. That this act included only "the duties paid by "Samuel A. Belden & Co. to the officers of the United

"States charged with their collection in the city of Mata-
"moras, whilst that city was under the military possession
"of the United States, for *merchandise except tobacco*, im-
"ported by them into Matamoras during that period,
"which, after the restoration of peace, they were deprived of
"by the judicial authorities of the Mexican Government."

Third. That the account stated by the officers of the Treasury under the act related exclusively to the *duties* which had been paid by Belden & Co. on their goods, *other than tobacco*, seized by the Mexican Government.

Fourth. That the moneys so found to be due, and that were paid in pursuance of the act and of the accounting under it, were the *duties* which Belden & Co. had paid on the goods seized as aforesaid.

Fifth. That the assignment was an assignment by Belden & Co. of all their right, title, claim and interest in and to the duties which were refunded to them, "*when received from the Government of Mexico*," and to any sums of money paid by Mexico in respect of the duties so refunded.

It is therefore necessary to ascertain from an inspection of the award whether or not any (and if any, what) portion of the amounts awarded to Belden & Co. represents the *duties* paid by Belden & Co. to the United States upon *merchandise other than tobacco* imported into Matamoras, of which the claimants were subsequently deprived by Mexico.

Now, whatever question may arise in respect to the United States' retention of the whole or any portion of the sum of $10,000 with interest from March 6, 1850, to July 10, 1871, awarded in respect of "*goods seized and sold under execution and loss attending the same*," it is indubitable that the United States have no right to retain any portion of the amount awarded the claimants by the Commissioners on account of their *tobacco*, viz., $13,154.56, with interest from October 20, 1849, to July 10, 1871, in the aggregate, principal and interest, $30,299.13.

It has been already seen that tobacco was expressly excepted from the provisions of the private act of Congress,

and was not embraced by the terms or operation of the assignment.

It is respectfully claimed and contended, therefore, that the whole of that award for tobacco is legally and justly payable to Belden & Co., and no part can be retained by the United States.

IX.

The main question that can here arise is as to the award $10,000, with interest, "*for goods seized and sold under execution and loss attending the same*," and it is whether the United States are entitled to retain any portion of *that* award by virtue of the act of 1855 and the assignment of Belden & Co.

Upon this question it is to be observed that it does not appear that one dollar was awarded Belden & Co. in respect of the duties refunded to them by the United States under the act of 1855.

The gross sum of $10,000 was awarded "*for goods seized and sold under execution and loss attending the same.*"

The award does not show that this sum, or any part of it, represented the duties refunded by the United States in July, 1855.

If, however, it can be reasonably inferred that the duties constituted an element in the award in respect of the goods to which the second claim of Belden & Co. related, the next question will be—What portion of the award is to be deemed as representing the duties paid to and subsequently refunded by the United States?

The duties levied by the United States were thirty *per cent ad valorem;* and they have therefore the right to retain, if any amount, no more than thirty per cent. of the $10,000 awarded for the loss of goods other than tobacco. The remainder of said sum of $10,000, viz., $7,000, with interest thereon, is, in this view, to be paid to the claimants.